Dato' Kanagalingam a/l Veluppillai v Majlis Peguam Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1300–06 OF 2018
LEE SWEE SENG, LEE HENG CHEONG AND HASHIM HAMZAH JJCA
27 DECEMBER 2021

Legal Profession — Disciplinary proceedings — Disciplinary Board/Committee — Disciplinary Board ('DB') affirmed Disciplinary Committee's ('DC') decision that respondent committed misconduct under s 94(3)(o) of the Legal Profession Act 1976 — DB decided to strike appellant of roll of advocates and solicitors of High Court of Malaya — High Court upheld decision of DB — Whether DB may find for misconduct not based on original complaint of conspiracy but on different complaint of appellant himself interfering and influencing appointment of top judicial positions — Whether compact disc ('CD') video recording produced before DC was admissible as direct oral evidence by maker of original CD — Whether CD produced before DC may be admissible as secondary evidence — Whether CD produced before DC was nevertheless admissible under s 90A of Evidence Act 1950 being computer-produced evidence — Whether CD produced and marked as exhibit and accepted as evidence was authentic or whether it had been tampered with or was otherwise unreliable — Whether appellant had rebutted evidence of what had transpired as recorded in CD — Whether DB order was defective for non-compliance with s 103D(1) of the Legal Profession Act 1976 ('LPA') in failing to record reasons for rejecting DC's recommendations — Whether appellant was denied of his right to be heard by DB's failure to consider and apply correct principles of law as provided under s 103D(4) of the LPA — Whether there was any merit in raising objection of bias — Whether court should interfere with punishment meted out by DB — Evidence Act 1950 ss 60, 63, 65, 90A & 90C — Legal Profession Act 1976 ss 94(3) & 103D

The Bar Council made its complaint to the Disciplinary Board ('DB') as it believed that the person captured in the video recording that was accessed through the website of an online news portal, Malaysiakini, was the appellant, a senior member of the Malaysian Bar and the subject matter of the conversation so captured was egregious enough to warrant an investigation into what the Bar Council saw as a serious misconduct. The DB found the appellant guilty under s 94(3)(o) of the Legal Profession Act 1976 ('the LPA') for conduct which was unbefitting of an advocate and solicitor or which brought or was calculated to bring the legal profession into disrepute. The stand of the appellant all along from the very start was that he was not the person in the recording and that in any event the recording, now downloaded from the website into a compact disc ('CD') was not the original and that it had

been tampered with or that it was otherwise inadmissible as hearsay evidence. The expert witness from Cyber Security Malaysia ('CW2') called by the Bar Council testified before the Disciplinary Committee ('DC') that the recording in the CD was authentic by the use of three tests whereas the expert witness of the appellant maintained that it could not be authenticated as it had been changed from a low frame rate to a faster frame rate and that it had been edited as the original recording was much longer. After a hearing that spanned over four years the DC found the appellant guilty of misconduct and the majority recommended a suspension of one year and a fine of RM20,000 whereas the minority Mr Gurmit Singh ('Mr Singh') recommended a suspension of two years and a fine of RM50,000. The matter then proceeded to the DB which agreed with the DC's finding of misconduct but disagreed with the punishment recommended. Prior to the making of the enhanced order, due notice had been given to the appellant pursuant to s 103D(2) and 103D(4) of the LPA for him to appear before the DB to make representations, before the DB proceeded to make the order. After some three adjournments on medical grounds the DB gave a final adjournment where counsel for the appellant appeared and requested for a further adjournment, which was disallowed by the DB. The appellant's counsel then took leave on ground that he had no instruction to submit further. The DB decided that the proper punishment was an order to strike off the appellant from the roll of advocates and solicitors of the High Court of Malaya. Against that decision of the DB made on 6 November 2015, the appellant appealed unsuccessfully to the High Court to set aside both the finding of misconduct and the punishment imposed. The High Court had dismissed the appeal of the appellant and upheld the decision of the DB. The appellant then appealed to the Court of Appeal to set aside the order of the DB and the High Court that had dismissed the appellant's appeal. The issues for consideration were: (a) whether the DB may find for misconduct not based on the original complaint of conspiracy but on a different complaint of the appellant himself interfering and influencing the appointment of top judicial positions; (b) whether the CD video recording produced before the DC was admissible as direct oral evidence by the maker of the original CD; (c) whether the CD produced before the DC may be admissible as secondary evidence; (d) whether the CD produced before the DC was nevertheless admissible under s 90A of the Evidence Act 1950 being computer-produced evidence; (e) whether the CD produced and marked as an exhibit and accepted as evidence was authentic or whether it had been tampered with or was otherwise unreliable; (f) whether the appellant had rebutted the evidence of what had transpired as recorded in the CD; (g) whether the DB order of 6 November 2015 was defective for non-compliance with s 103D(1) of the LPA in failing to record the reasons for rejecting the DC's recommendations; (h) whether the appellant was denied of his right to be heard by the DB's failure to consider and apply the correct principles of law as provided under s 103D(4) of the LPA; (i) whether there was any merit in raising the objection of bias on the part of Mr Singh who was said to be seen having a conversation with Loh

Mui Fah ('CW4') at the lobby of the building where the DB was before the DC began hearing the complaint; and (j) whether the court should interfere with the punishment meted out by the DB with respect to striking the appellant off the roll of advocates and solicitors.

Held, dismissing the appeal:

(1) The appellant's conduct, words and actions need not be in relation to Loh Gwo Burne ('CW3') and his father, CW4 as his clients in his professional capacity for s 94(3) of the LPA also said 'in a professional capacity or otherwise.' The fact that no evidence was led on the involvement of other 'various parties' did not mean that there was no misconduct because the involvement of other parties whether proved or otherwise, did not change the character of the misconduct of the appellant and more so when these 'various parties' need not submit to the jurisdiction of the DB which had no jurisdiction over them to begin with. Whether 'various parties' were involved rather than the appellant alone, did not in the context of this complaint of misconduct, further aggravated the misconduct as the core and crux of the misconduct was still that of to 'interfere and influence judicial appointments'. There was thus no merits in the submission of the appellant that the DB's order to increase the punishment on the appellant was based on a different and more serious charge of misconduct which was never alleged or proved against the appellant (see paras 32–34 & 42).

(2) CW3 confirmed that he was the one who took the video recording and that the person speaking on the video recording was the appellant. CW4 confirmed in his testimony before the DC that he had viewed the video clip and that the person speaking on the mobile phone was the appellant. CW3 and CW4 were entitled and allowed to testify with respect to what they had seen with their eyes and heard with their ears or perceived through their senses. That was allowed under s 60(1)(b) of the Evidence Act 1950. The oral and documentary evidence of the witnesses especially that of the CW2, CW3 and CW4 would be relevant and admissible (see paras 63–65 & 71).

(3) CW3 had explained before the DC that he had downloaded the video recording he made onto his computer and then a month later, he had burnt the video recording from his computer into a video CD. The original recording was lost within the meaning of s 65(1)(c) and hence secondary evidence of it was admissible under s 65(2) of the Evidence Act 1950. The important thing was that the one who recorded it had himself seen the original recording and was in no doubt that what he saw of the CD produced at the DC hearing was the same as what he had originally seen, heard or perceived in the house of the appellant. It was precisely the situation envisaged in s 63(b) as well as s 63(e) of the Evidence Act 1950.

What was even more important was that CW3 and CW4 were both able to confirm the contents of the CD produced before the DC as correctly or accurately capturing the events of that evening where the subject of the conversation that formed the evidence for the charge was concerned. The appellant had stated that he could not recall that such a conversation had taken place. Not being able to recall would mean that the appellant was not able to rebut what CW3 and CW4 had testified for they were able to recall what they heard after watching the video being played (see paras 76, 79–81 & 94).

(4) The suggestion by the appellant that what had been originally recorded was longer than what was later uploaded into the website of Malaysiakini in that it had been edited did not cause undue alarm unless the appellant was saying that the part not produced would exculpate him. However that would only make sense and be valid a proposition if in the first place the appellant was prepared to concede and admit that it was him in the video clip. The way ss 90A and 90C of the Evidence Act 1950 were worded was such that it was an inclusionary rule admitting evidence rather than an exclusionary rule with the default position being that evidence produced by a computer was generally admissible subject only to weight to be attached to it by the court. Hence s 90C of the Evidence Act 1950 was included to cement the position of granting admissibility of computer-produced evidence such that it trumped and prevailed over other inconsistent provisions in the Evidence Act 1950 and even under any other legislation in conflict with it. Therefore even if the original recording or document for some reason was not produced because it was lost, misplaced, irretrievable or the maker could not be found, that did not prevent the computer-produced evidence in the CD from being admitted as evidence. It also did not matter whether the document produced by the computer was an unknown number of reproduction from the original computer-produced document. The distinction between an 'original' and a 'copy' of it or even 'copies from a copy' of it or for that matter 'copies of copies of copies', all faded and paled into insignificance. The ultimate question was whether what was recorded in the document was accurate or authentic (see paras 107–109).

(5) CW2 had conducted three types of analysis on the video clip. The analysis concluded that the video file was authentic. No editing or addition that indicated superimpose was made to the video was found on the video file. The was also a suggestion that CW2 did not examine exh C1 that was created on 19 September 2007 on a CD manufactured by 'Swisstec' but rather CD-R that was created on 18 September 2007 on a CD manufactured by 'Melody'. Whilst the two CDs containing the video clip was different in that they were created on different times and dates, there was no evidence to suggest that the video clips were of a different event. The assertion that one was one second shorter than the

other and as such could be a recording of a different event would be too speculative and descending to de minimis. The DC was right in rejecting the objections raised by the appellant against the admissibility of the CD in exh C1 and the report of CW2 on the authenticity of recording made. The conclusions of the DC that the recording in the video clip was accurate and authentic to be well supported by the evidence adduced and the Bar Council's expert evidence (see paras 126–127, 129–130 & 136–137).

(6) The transcript of the recording would represent what the appellant said he had done and would do and the DC was right to conclude that such action would amount to interfering with and influencing judicial appointments. The evidential burden had shifted to the appellant, at the conclusion of the complainant's case before the DC, to rebut what was adduced by the Bar Council. The appellant had not denied that CW3 and CW4 had come over to his home for a dinner at his invitation but only denied that the person in the video was him and that he could not recall such a conversation. At any rate, what he said he had wanted to ensure would come to pass did in fact happen with 'prophetic' precision. The DC's finding that the complainant had proved beyond a reasonable doubt that the appellant had interfered with and influenced judicial appointments was safe. There was no good reason to interfere with the finding of facts of the DC and the DB (see paras 143–145 & 149–151).

(7) There did not appear to be any requirement of service of the reasons for the rejection of the DC's recommendation where penalty or punishment was concerned though one may presume that the reasons should be given if the advocate and solicitor concerned should request for the reasons. Further the fact that s 130D(4) of the LPA required the DB to inform the advocate and solicitors of its intention to make an order likely to be adverse against him and to give him a reasonable opportunity to be heard would safeguard against any prejudice arising with respect to the appellant not being aware of the reasons for the greater or even greatest punishment. For the appellant's submission that the reasons for rejecting the recommendation of the DC must itself be stated in the order so made, there was no requirement for that for the reasons may go into several paragraphs as in this case and what was generally to be stated in all orders was the dispositive portion which told the parties how the matter had been disposed of (see paras 155–156).

(8) There was no merit in the appellant's argument that there had been a breach of natural justice in that the appellant was not heard in person before the punishment was handed down by the DB. All that was required under s 103D(4) of the LPA was a 'reasonable opportunity to be heard'. Whilst every latitude should be given on health issues there comes a time where the appellant could well make his representations through

his solicitor who appeared at the last adjourned date before the DB would be more than able to advance every mitigating ground on why a heavier punishment should not be imposed. There was no breach of natural justice where the appellant could not be present after three adjournments in a proceeding. The DB's refusal to grant further adjournment when it was all ears to hear the appellant's counsel was reasonable (see paras 168, 170–171 & 173).

(9) Any issue of bias must be raised promptly and not after the end of the proceedings when the decision had been delivered. The appellant himself was content to proceed with the hearing before the DC, in which Mr Singh was a member, for a period of almost four years. That did not sound like a person who was disturbed by the notion of real likelihood of bias. As the appellant knew about the meeting before the start of the proceedings before the DC, then if that short conversation raised concerns of bias, the concern should be raised there and then and not raised for the first time before the DB. In any event there were still the other two members of the DC who came to the same finding of facts of liability and any recommendation on the punishment was a mere recommendation to the DB who may or may not agree with the DC. The court was not persuaded that Mr Singh's decision had been tainted with bias (see paras 175, 177 & 182).

(10) As for the punishment, that was best left to the DB for it was the profession that had been conferred the duty to enforce its own disciplinary standard. The DB had complied with s 103D of the LPA in giving its reasons for disagreeing with the recommended punishment of the DC. The punishment of been struck off the roll was reserved for the most egregious of misconduct involving generally of breach of trust of client's money. However the profession and the DB in particular was entitled to show its revulsion at such an inimical conduct of the appellant. The standard of proof was that of beyond a reasonable doubt where the misconduct involved the element of dishonest conduct and moral turpitude and that burden on the Bar Council had been discharged (see paras 186, 189 & 191–192).

[Bahasa Malaysia summary

Majlis Peguam membuat aduan kepada Lembaga Tatatertib ('LT') kerana percaya orang yang dirakam dalam rakaman video yang diakses melalui laman web portal berita dalam talian, Malaysiakini, adalah perayu, seorang ahli lama Majlis Peguam dan perkara subjek perbualan yang ditangkap itu cukup teruk untuk mewajarkan penyiasatan terhadap perkara yang dilihat oleh Majlis Peguam sebagai salah laku yang serius. DB mendapati perayu bersalah di bawah s 94(3)(o) Akta Profesion Undang-Undang 1976 ('APU') kerana perbuatan yang tidak sepatutnya oleh seorang peguambela dan peguamcara kelakuan atau yang membawa atau dikira untuk mencemarkan profesion

undang-undang. Pendirian perayu sejak awal lagi ialah bahawa dia bukanlah orang dalam rakaman itu dan dalam apa jua keadaan rakaman itu, kini dimuat turun daripada laman web ke dalam cakera padat ('CD') bukanlah yang asal dan bahawa ia telah diubah atau ia sebaliknya tidak boleh diterima kerana keterangan dengar cakap. Saksi pakar dari Cyber Security Malaysia ('CW2') yang dipanggil oleh Majlis Peguam memberi keterangan di hadapan Jawatankuasa Tatatertib ('JT') bahawa rakaman dalam CD itu adalah sahih dengan menggunakan tiga ujian sedangkan saksi pakar perayu menegaskan bahawa ia tidak boleh disahkan kerana ia telah ditukar daripada kadar bingkai rendah kepada kadar bingkai yang lebih pantas dan ia telah disunting kerana rakaman asal adalah lebih lama. Selepas perbicaraan yang berlangsung selama empat tahun, JT mendapati perayu bersalah melakukan salah laku dan majoriti mencadangkan penggantungan selama setahun dan denda RM20,000 manakala minoriti En Gurmit Singh ('En Singh') mencadangkan penggantungan selama dua tahun dan denda RM50,000. Perkara itu kemudiannya diteruskan kepada LT yang bersetuju dengan penemuan salah laku JT tetapi tidak bersetuju dengan hukuman yang dicadangkan. Sebelum membuat perintah yang dipertingkatkan, notis yang sewajarnya telah diberikan kepada perayu menurut s 103D(2) dan 103D(4) APU untuk beliau hadir di hadapan LT untuk membuat representasi, sebelum LT meneruskan untuk membuat perintah. Selepas kira-kira tiga penangguhan atas alasan perubatan, LT memberikan penangguhan terakhir di mana peguam perayu hadir dan meminta penangguhan selanjutnya, yang tidak dibenarkan oleh LT. Peguam perayu kemudiannya pergi meninggalkan atas alasan bahawa dia tidak mempunyai arahan untuk berhujah lebih lanjut. LT memutuskan bahawa hukuman yang sewajarnya ialah perintah untuk menggugurkan perayu daripada senarai peguambela dan peguamcara Mahkamah Tinggi Malaya. Terhadap keputusan LT yang dibuat pada 6 November 2015, perayu tidak berjaya merayu kepada Mahkamah Tinggi untuk mengetepikan kedua-dua dapatan salah laku dan hukuman yang dikenakan. Mahkamah Tinggi telah menolak rayuan perayu dan mengekalkan keputusan LT. Perayu kemudiannya merayu kepada Mahkamah Rayuan untuk mengetepikan perintah LT dan Mahkamah Tinggi yang telah menolak rayuan perayu. Isu-isu untuk pertimbangan adalah: (a) sama ada LT boleh mendapati salah laku bukan berdasarkan aduan asal konspirasi tetapi atas aduan berbeza perayu sendiri campur tangan dan mempengaruhi pelantikan jawatan tertinggi kehakiman; (b) sama ada rakaman video CD yang dihasilkan di hadapan JT boleh diterima sebagai keterangan lisan langsung oleh pembuat CD asal; (c) sama ada CD yang dikeluarkan di hadapan JT boleh diterima sebagai keterangan sekunder; (d) sama ada CD yang dikeluarkan di hadapan JT masih boleh diterima di bawah s 90A Akta Keterangan 1950 sebagai keterangan yang dihasilkan oleh komputer; (e) sama ada CD yang dihasilkan dan ditanda sebagai ekshibit dan diterima sebagai keterangan adalah sahih atau sama ada ia telah diubah atau sebaliknya tidak boleh dipercayai; (f) sama ada perayu telah menyangkal keterangan tentang apa yang telah berlaku seperti yang direkodkan dalam CD;

(g) sama ada perintah LT pada 6 November 2015 rosak kerana tidak mematuhi s 103D(1) APU kerana gagal merekodkan sebab penolakan cadangan JT; (h) sama ada perayu telah dinafikan haknya untuk didengari oleh kegagalan LT untuk mempertimbangkan dan menggunakan prinsip undang-undang yang betul seperti yang diperuntukkan di bawah s 103D(4) APU; (i) sama ada terdapat sebarang merit dalam membangkitkan bantahan berat sebelah di pihak En Singh yang dikatakan dilihat berbual dengan Loh Mui Fah ('CW4') di lobi bangunan di mana LT berada di hadapan JT mula mendengar aduan; dan (j) sama ada mahkamah patut campur tangan dengan hukuman yang dijatuhkan oleh LT berkenaan dengan menggugurkan perayu daripada senarai peguambela dan peguamcara.

Diputuskan, menolak rayuan:

(1) Kelakuan, perkataan dan tindakan perayu tidak perlu berkaitan dengan Loh Gwo Burne ('CW3') dan bapanya, CW4 sebagai anak guamnya dalam kapasiti profesionalnya kerana s 94(3) APU juga berkata 'dalam kapasiti profesional atau sebaliknya'. Hakikat bahawa tiada keterangan diketuai mengenai penglibatan 'pelbagai pihak' lain tidak bermakna tiada salah laku kerana penglibatan pihak lain sama ada terbukti atau sebaliknya, tidak mengubah watak salah laku perayu dan lebih-lebih lagi apabila 'pelbagai pihak' ini tidak perlu tunduk kepada bidang kuasa LT yang tidak mempunyai bidang kuasa ke atas mereka pada mulanya. Sama ada 'pelbagai pihak' terlibat dan bukannya perayu sahaja, tidak dalam konteks aduan salah laku ini, memburukkan lagi salah laku itu kerana teras dan inti salah laku itu masih lagi 'mengganggu dan mempengaruhi pelantikan kehakiman'. Oleh itu, tiada merit dalam penghujahan perayu bahawa perintah LT untuk meningkatkan hukuman ke atas perayu adalah berdasarkan pertuduhan salah laku yang berbeza dan lebih serius yang tidak pernah didakwa atau dibuktikan terhadap perayu (lihat perenggan 32–34 & 42).

(2) CW3 mengesahkan bahawa dialah yang mengambil rakaman video itu dan orang yang bercakap dalam rakaman video itu ialah perayu. CW4 mengesahkan dalam keterangannya di hadapan JT bahawa dia telah melihat klip video itu dan bahawa orang yang bercakap melalui telefon bimbit adalah perayu. CW3 dan CW4 berhak dan dibenarkan untuk memberi keterangan berkenaan dengan apa yang telah mereka lihat dengan mata dan dengar dengan telinga atau yang dilihat melalui deria mereka. Ia dibenarkan di bawah s 60(1)(b) Akta Keterangan 1950. Keterangan lisan dan dokumentari saksi terutamanya keterangan CW2, CW3 dan CW4 adalah relevan dan boleh diterima (lihat perenggan 63–65 & 71).

(3) CW3 telah menjelaskan kepada JT bahawa dia telah memuat turun rakaman video yang dibuatnya ke komputernya dan kemudian sebulan

kemudian, dia telah menyimpan rakaman video dari komputernya ke dalam video CD. Rakaman asal telah hilang dalam pengertian s 65(1)(c) dan oleh itu keterangan sekunder mengenainya boleh diterima di bawah s 65(2) Akta Keterangan 1950. Yang penting ialah orang yang merekodkannya telah melihat sendiri rakaman asal dan tidak syak lagi bahawa apa yang dia lihat tentang CD yang dihasilkan pada perbicaraan JT adalah sama dengan apa yang dia lihat, dengar atau perasan pada asalnya di rumah perayu. Ia adalah keadaan yang dibayangkan dalam s 63(b) serta s 63(e) Akta Keterangan 1950. Apa yang lebih penting ialah CW3 dan CW4 kedua-duanya dapat mengesahkan kandungan CD yang dihasilkan di hadapan JT sebagai menangkap dengan betul atau tepat peristiwa petang itu di mana subjek perbualan yang membentuk keterangan bagi pertuduhan berkenaan. Perayu telah menyatakan bahawa dia tidak ingat bahawa perbualan seperti itu telah berlaku. Tidak dapat mengingat kembali bermakna perayu tidak dapat menyangkal apa yang telah disaksikan oleh CW3 dan CW4 kerana mereka dapat mengingat kembali apa yang mereka dengar selepas menonton video yang dimainkan (lihat perenggan 76, 79–81 & 94).

(4) Cadangan perayu bahawa apa yang direkodkan pada asalnya adalah lebih panjang daripada apa yang kemudiannya dimuat naik ke dalam laman web Malaysiakini kerana ia telah disunting tidak menyebabkan kebimbangan yang tidak wajar melainkan perayu mengatakan bahawa bahagian yang tidak dihasilkan akan mengecualikannya. Walau bagaimanapun, ia hanya masuk akal dan sah suatu cadangan jika pada mulanya perayu bersedia untuk mengaku dan mengakui bahawa itu adalah beliau dalam klip video itu. Cara ss 90A dan 90C Akta Keterangan 1950 menyatakan sedemikian rupa sehingga ia merupakan peraturan kemasukan yang menerima keterangan dan bukannya peraturan pengecualian dengan kedudukan gagal adalah keterangan yang dikeluarkan oleh komputer secara amnya boleh diterima tertakluk hanya pada berat yang perlu dilampirkan terhadapnya oleh mahkamah. Oleh itu s 90C Akta Keterangan 1950 dimasukkan untuk mengukuhkan kedudukan memberikan kebolehterimaan keterangan yang dihasilkan oleh komputer supaya ia melebihi dan mengatasi peruntukan lain yang tidak konsisten dalam Akta Keterangan 1950 dan juga di bawah mana-mana perundangan lain yang bercanggah dengannya. Oleh itu, walaupun rakaman atau dokumen asal atas sebab tertentu tidak dihasilkan kerana ia hilang, tersilap letak, tidak dapat diperoleh semula atau pembuat tidak dapat ditemui, itu tidak menghalang keterangan yang dihasilkan komputer dalam CD daripada diterima sebagai bukti. Ia juga tidak kira sama ada dokumen yang dihasilkan oleh komputer itu adalah jumlah pengeluaran semula yang tidak diketahui daripada dokumen asal yang dihasilkan oleh komputer. Perbezaan antara 'asal' dan 'salinan' atau bahkan 'salinan daripada salinan' atau 'salinan daripada

salinan daripada salinan', semuanya pudar dan menjadi tidak penting. Persoalan utama ialah sama ada apa yang direkodkan dalam dokumen itu tepat atau sahih (lihat perenggan 107–109).

(5) CW2 telah menjalankan tiga jenis analisis pada klip video tersebut. Analisis menyimpulkan bahawa fail video adalah sahih. Tiada penyuntingan atau penambahan yang menunjukkan 'superimpose' dibuat pada video ditemui pada fail video. Terdapat juga merupakan cadangan bahawa CW2 tidak memeriksa eksh C1 yang dihasilkan pada 19 September 2007 pada CD yang dikeluarkan oleh 'Swisstec' tetapi sebaliknya CD-R yang dihasilkan pada 18 September 2007 pada CD yang dikeluarkan oleh 'Melody'. Walaupun kedua-dua CD yang mengandungi klip video itu berbeza kerana ia dihasilkan pada masa dan tarikh yang berbeza, tiada bukti yang menunjukkan bahawa klip video itu adalah acara yang berbeza. Penegasan bahawa satu saat lebih pendek daripada yang lain dan oleh itu boleh menjadi rakaman peristiwa yang berbeza akan menjadi terlalu spekulatif dan menjadi de minimis. JT adalah betul dalam menolak bantahan yang dibangkitkan oleh perayu terhadap kebolehterimaan CD dalam eksh C1 dan laporan CW2 mengenai kesahihan rakaman yang dibuat. Kesimpulan JT bahawa rakaman dalam klip video itu adalah tepat dan sahih disokong dengan baik oleh keterangan yang dikemukakan dan keterangan pakar Majlis Peguam (lihat perenggan 126–127, 129–130 & 136–137).

(6) Transkrip rakaman tersebut mewakili apa yang dikatakan perayu telah dilakukan dan akan dilakukannya dan JT adalah betul untuk membuat kesimpulan bahawa tindakan sedemikian akan sama dengan campur tangan dan mempengaruhi pelantikan kehakiman. Beban keterangan telah beralih kepada perayu, pada kesimpulan kes pengadu di hadapan JT, untuk menyangkal apa yang dikemukakan oleh Majlis Peguam. Perayu tidak menafikan bahawa CW3 dan CW4 telah datang ke rumahnya untuk makan malam atas jemputannya tetapi hanya menafikan bahawa orang dalam video itu adalah beliau dan bahawa beliau tidak dapat mengingati perbualan sedemikian. Walau apa pun, apa yang dikatakannya ingin dipastikan akan berlaku sebenarnya berlaku dengan ketepatan 'prophetic'. Penemuan JT bahawa pengadu telah membuktikan tanpa keraguan munasabah bahawa perayu telah campur tangan dan mempengaruhi pelantikan kehakiman adalah selamat. Tidak ada sebab yang kukuh untuk mengganggu penemuan fakta JT dan LT (lihat perenggan 143–145 & 149–151).

(7) Tidak terdapat apa-apa keperluan penyampaian sebab-sebab penolakan cadangan JT di mana penalti atau hukuman berkenaan walaupun seseorang mungkin menganggap bahawa alasan harus diberikan jika peguambela dan peguamcara yang berkenaan meminta alasan itu. Selanjutnya fakta bahawa s 130D(4) APU menghendaki LT

memaklumkan peguambela dan peguamcara tentang niatnya untuk membuat perintah yang berkemungkinan tidak baik terhadapnya dan memberinya peluang yang munasabah untuk didengar akan melindungi daripada sebarang prasangka yang timbul berkenaan dengan perayu tidak mengetahui sebab-sebab hukuman yang besar atau lebih besar. Bagi hujahan perayu bahawa sebab-sebab penolakan cadangan JT itu sendiri mesti dinyatakan dalam perintah yang dibuat sedemikian, tidak ada keperluan untuk itu kerana sebab-sebab tersebut boleh masuk ke dalam beberapa perenggan seperti dalam kes ini dan apa yang secara amnya dinyatakan dalam semua perintah adalah bahagian dispositif yang memberitahu pihak-pihak bagaimana perkara itu telah dilupuskan (lihat perenggan 155–156).

(8) Tiada merit dalam hujahan perayu bahawa telah berlaku pelanggaran keadilan semula jadi kerana perayu tidak didengar secara peribadi sebelum hukuman itu dijatuhkan oleh LT. Apa yang diperlukan di bawah s 103D(4) APU ialah 'peluang yang munasabah untuk didengari'. Walaupun setiap latitud harus diberikan mengenai isu kesihatan, tiba masanya perayu boleh membuat representasinya melalui peguamcaranya yang hadir pada tarikh penangguhan terakhir di hadapan LT yang akan lebih daripada mampu untuk mendahulukan setiap alasan mitigasi mengapa hukuman yang lebih berat harus tidak dikenakan. Tiada perlanggaran keadilan semula jadi di mana perayu tidak dapat hadir selepas tiga kali penangguhan dalam prosiding. Keengganan LT untuk memberikan penangguhan selanjutnya apabila semua pihak mendengar peguam perayu adalah munasabah (lihat perenggan 168, 170–171 & 173).

(9) Sebarang isu berat sebelah mesti dibangkitkan dengan segera dan bukan selepas tamat prosiding apabila keputusan itu telah disampaikan. Perayu sendiri berpuas hati untuk meneruskan perbicaraan di hadapan JT, di mana Encik Singh menjadi ahli, untuk tempoh hampir empat tahun. Ia tidak terdengar seperti orang yang terganggu oleh tanggapan kemungkinan berat sebelah. Memandangkan perayu mengetahui tentang mesyuarat itu sebelum permulaan prosiding di hadapan JT, maka jika perbualan singkat itu menimbulkan kebimbangan berat sebelah, kebimbangan itu harus dibangkitkan di sana dan kemudian dan tidak dibangkitkan buat kali pertama di hadapan LT. Walau apa pun, masih terdapat dua lagi ahli JT yang datang kepada penemuan fakta liabiliti yang sama dan sebarang cadangan mengenai hukuman itu hanyalah cadangan kepada LT yang mungkin bersetuju atau tidak dengan JT. Mahkamah tidak diyakinkan bahawa keputusan Encik Singh telah dicemari dengan berat sebelah (lihat perenggan 175, 177 & 182).

(10) Bagi hukuman, yang terbaik diserahkan kepada LT kerana profesion yang telah diberikan kewajipan untuk menguatkuasakan standard

tatatertibnya sendiri. LT telah mematuhi s 103D APU dalam memberikan alasannya untuk tidak bersetuju dengan hukuman yang dicadangkan JT. Hukuman menggugurkan daripada senarai dikhaskan untuk salah laku yang paling teruk yang melibatkan secara amnya pecah amanah wang pelanggan. Walau bagaimanapun, profesion dan LT khususnya berhak untuk menunjukkan rasa penentangannya terhadap kelakuan perayu yang memudaratkan itu. Standard pembuktian adalah melampaui keraguan munasabah di mana salah laku melibatkan unsur kelakuan tidak jujur dan keburukan moral dan beban Majlis Peguam telah dilepaskan (lihat perenggan 186, 189 & 191–192).]

Cases referred to

Azhar bin Che Wil v PP [2010] 6 MLJ 22, FC (refd)
Bar Council Malaysia v Sarjit Kaur d/o Tharam Singh [2017] MLJU 818; [2017] 1 LNS 719, CA (refd)
Campbell v Hamlet [2005] 3 All ER 1116, PC (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaran a/l N Gopal (Bar Council Malaysia, intervener) [2016] 5 MLJ 79; [2016] 7 CLJ 667, CA (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265; [2018] 2 CLJ 1, FC (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213; [1995] 2 CLJ 900, CA (refd)
Jorgensen v Beach 'N' Bay Realty, Inc, 177 Cal Rptr 882, CA (refd)
Kajola v Noble (1982) 75 Cr App Rep 149 (refd)
Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)
Lau Keen Fai v Lim Ban Kay@ Lim Chiam Boon & Anor [2012] 2 MLJ 8; [2011] 3 CLJ 213, HC (refd)
Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1; [2008] 4 CLJ 317, FC (refd)
Ling Hang Tsyr v PP [2019] MLJU 1182, CA (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65; [2000] QB 451, CA (refd)
Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor [2017] 1 MLJ 596, FC (refd)
Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2019] 1 MLJ 95; [2018] 9 CLJ 622, FC (refd)
Majlis Peguam v Dato' Seri Dr Muhammad Shafee Abdullah [2016] 5 MLJ 572; [2016] 8 CLJ 749, FC (refd)
Meena a/p Muniandi lwn Sarjit Kaur d/o Tharam Singh (Majlis Peguam Malaysia, pencelah) [2016] MLJU 501; [2016] 9 CLJ 253, HC (refd)
Mohd Ali Jaafar v PP [1998] 4 MLJ 210, HC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328; [2013] 3 MLRA 664, CA (refd)
Regina v Maqsud Ali; Regina v Ashiq Hussain [1966] 1 QB 688, CA (refd)
Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as

Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1, FC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)

Legislation referred to

Criminal Procedure Code ss 116B, 422
Evidence Act 1950 ss 2, 3, 60(1)(a), (1)(b), 63, 63(b), (e), 64, 65, 65(1)(c), 65(2), 90(6), 90A, 90A(1), (2), (3), (4), 90B, 90C
Legal Profession Act 1976 ss 94(1), (2), (3), (3)(c), (3)(k) (3)(o), 103D, 103D(1), (2), (4)
Legal Profession (Practice and Etiquette) Rules 1994 r 31
Penal Code ss 35, 109, 120B, 302

Appeal from: Originating Summons No 17D-44–12 of 2015 (High Court, Kuala Lumpur)

R Thayalan (V Siva & Partners) for the appellant.
Razlan Hadri (Kwan Will Sen, James Khong, Saritha Devi and Danny Soong Hou Ming with him) (Gan Ho & Razlan Hadri) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] Once in a while there is a massive revelation and various quarters would sensationalise and capitalise on it. However the issue before the court, remote and far removed from the reverberations that first arose from its revelation is this: whether what was said by a lawyer in a conversation on a handphone regarding matters relating to the appointment to top positions in the Malaysian judiciary amounted to misconduct of interfering with and influencing judicial appointments.

[2] Related to that question is the issue of the admissibility of a video clip of the conversation and the event in the house of the said lawyer when the original recording is not available but the maker of it confirmed the accuracy and authenticity of the video clip.

[3] The Bar Council made its complaint vide its letter of 26 September 2007 to the Disciplinary Board ('DB') as it believed that the person captured in the video recording that was accessed through the website of an online news portal, Malaysiakini, is the appellant, a senior member of the Malaysian Bar and the subject matter of the conversation so captured was egregious enough to warrant an investigation into what the Bar Council saw as a serious misconduct.

[4] The misconduct of the appellant is said to be caught under s 94(3)(c), 94(3)(k) and specifically r 31 of the Legal Profession (Practice and Etiquette)

Rules 1994, and/or 94(3)(o) of the Legal Profession Act 1976 ('the LPA'). At the end of the day the DB found the appellant guilty under s 94(3)(o) for conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute and of Rule 31 which reads: 'Every advocate and solicitor shall at all times uphold the dignity and high standing of the profession'.

[5] The stand of the appellant all along from the very start was that he was not the person in the recording and that in any event the recording, now downloaded from the website into a compact disc (CD) is not the original and that it has been tampered with or that it is otherwise inadmissible as hearsay evidence.

[6] The expert witness called by the Bar Council testified before the Disciplinary Committee ('DC') the recording in the CD is authentic by the use of three tests of frame consistency analysis, pixel consistency analysis and light-shadow analysis whereas the expert witness of the appellant maintained that it could not be authenticated as it had been changed from a low frame rate to a faster frame rate and that it had been edited as the original recording is much longer.

[7] After a hearing that spanned over four years the DC on 20 February 2014 found the appellant guilty of misconduct and the majority recommended a suspension of one year and a fine of RM20,000 whereas the minority Mr Gurmit Singh ('Mr Singh') recommended a suspension of two years and a fine of RM50,000.

[8] The matter then proceeded to the Disciplinary Board ('DB') which agreed with the DC's finding of misconduct but disagreed with the punishment recommended.

[9] Prior to the making of the enhanced order, due notice had been given to the appellant pursuant to s 103D(2) and 103D(4) of the LPA for him to appear before the DB on 12 September 2014 to make representations, before the DB proceeded to make the order. After some three adjournments on medical grounds the DB gave a final adjournment where learned counsel for the appellant appeared and requested for a further adjournment, which was disallowed by the DB. Learned counsel then took leave on ground that he had no instruction to submit further.

[10] The DB decided that the proper punishment was an order to strike off the appellant from the roll of advocates and solicitors of the High Court of Malaya.

[11] Against that decision of the DB made on 6 November 2015, the appellant appealed unsuccessfully to the High Court to set aside both the finding of misconduct and the punishment imposed. The High Court had on 22 May 2016 dismissed the appeal of the appellant and upheld the decision of the DB.

[12] The appellant then appealed to the Court of Appeal to set aside the order of the DB and the High Court that had dismissed the appellant's appeal. The issues raised in the appeal before us shall now be considered under the headings below.

[13] For completeness there was also a complaint against the appellant in relation to fixing of cases by the appellant which the DC dismissed on ground of no evidence proffered by the complainant and which decision was confirmed by the DB. There was no appeal against that decision of the DB.

PRINCIPLES OF APPELLATE INTERVENTION IN APPEALS FROM A DECISION OF THE DB UNDER THE LEGAL PROFESSION ACT 1976

[14] The principles for appellate intervention in appeals against the decision of the DB under the LPA may be succinctly summarised in the two recent cases of the Federal Court.

[15] In *Majlis Peguam v Dato' Seri Dr Muhammad Shafee Abdullah* [2016] 5 MLJ 572; [2016] 8 CLJ 749 it was reiterated as follows:

> Unless the disciplinary committee in the exercise of its powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the court ought not interfere, except in the rarest of cases. This principle has been applied consistently by our courts (see cases of *Re A Solicitor (No 2)* [1923] 93 LJKB 761; *Re A Solicitor* [1969] 3 All ER 610; *Keith Sellar v Lee Kwang And Tennakoon v Lee Kwang* [1980] 2 MLJ 191; [1980] 1 LNS 36; [1980] 1 MLRA 461; *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878; [1998] 2 MLRA 208; *Merchant v Law Society of Saskatchewan* [2002] 8 WWB 214).

[16] In *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; [2018] 2 CLJ 1, the Federal Court again underscored the limited circumstances under which appellate intervention may be justified as follows:

> [23] ... The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie:
>
> (a) when the findings are manifestly perverse;

(b) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(c) there had been breach of natural justice.

WHETHER THE DB MAY FIND FOR MISCONDUCT NOT BASED ON THE ORIGINAL COMPLAINT OF CONSPIRACY BUT ON A DIFFERENT COMPLAINT OF THE APPELLANT HIMSELF INTERFERING AND INFLUENCING THE APPOINTMENT OF TOP JUDICIAL POSITIONS

[17] It was argued before us that the DC had found the appellant liable not for the misconduct levelled against the appellant but for a different misconduct as the original complaint was that the appellant had 'conspired with various parties to interfere and influence judicial appointments'.

[18] It was argued for the appellant that the DC had found the appellant guilty of a different complaint in that he had interfered or influenced judicial appointments and in particular that of Tan Sri Ahmad Fairuz as Chief Judge of Malaya ('CJM') and his confirmation as President of the Court of Appeal ('PCA'), when the complaint had alleged that he had 'conspired with various parties'.

[19] We must be careful not to equate a complaint of misconduct to that of a criminal charge of conspiracy to do an illegal or unlawful act. Here the essence of the complaint is that of seeking to interfere or influence judicial appointments. Whether the appellant did that alone or with the joint efforts or arrangements with others is secondary and evidential.

[20] From the evidence presented before the DC, the DC found no evidence of others involved other than the appellant. That was a conclusion that the DC was entitled to arrive at from the evidence adduced.

[21] Unlike a criminal charge and trial, there is no necessity for a formal amendment of a complaint of misconduct and particularly so when the difference in the nature of the misconduct is the difference in the means of carrying out the offence between whether one commits the misconduct alone or together with others. Learned counsel for the appellant appeared to be applying the strict rules of criminal procedure in a criminal trial of which a disciplinary proceeding under the LPA is not.

[22] We hearken to the observation of the Federal Court in *Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor* [2017] 1 MLJ 596, speaking through Ramly Ali FCJ as follows:

A [31] At the outset, it must be stressed that disciplinary proceedings against a solicitor under the LPA are not proceedings in a criminal court of law. *The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court* (see *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor)* [2006] 2 MLJ 343). On this point we agree with Abdull
B Hamid Embong J (as he then was), in *Jerald Allen Gormez* when His Lordship commented:

> To say that, in the absence of such procedures, the disciplinary committee should adhere strictly to the procedures in the proceedings of a criminal court, would be implying some requirements not intended by statute.

C ...

> [33] It is a trite principle that a disciplinary committee of a professional body is entitled to conduct its disciplinary hearing in respect of a member of the body in whatever way it deems appropriate provided that the method or manner it adopts is
D not in breach of any specific provisions of the relevant statutes or regulations and does not result in a denial of natural justice to the member concerned.
>
> [34] In *Lim Ko & Anor v Board of Architects* [1966] 2 MLJ 80, the Federal Court held, inter alia, that the proceedings of disciplinary tribunals or committees conducting an inquiry are *by no means bound by the strict rules which apply to*
E *criminal trials. A legalistic approach is not appropriate in those proceedings.* The same principle was adopted by the Federal Court in *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238; *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124; and by the Court of Appeal in *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29. (Emphasis added.)

F

[23] Even if one were to analogise it with a criminal charge, it was always open to a criminal court to find an accused guilty of the same offence or a different offence, based on a subset of the original facts for in a criminal charge for conspiracy there could even be a charge of 'conspiracy with persons still at
G large'.

[24] See for example the charge of the accused for murder 'together with one person who is *still at large* namely ... in furtherance of common intention, *by*
H *way of conspiracy*, abetted one ... in the commission of the murder of ...'. (Emphasis added.) In *Ling Hang Tsyr v Public Prosecutor* [2019] MLJU 1182 and the case of *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328; [2013] 3 MLRA 664 where one of the accused persons was charged for '*conspiring with others* to commit murder resulting in the death of ...'.
I (Emphasis added.)

[25] The observation of Her Ladyship Aziah Ali J (later FCJ) as follows in *Lau Keen Fai v Lim Ban Kay@ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2011] 3 CLJ 213 resonates with us:

[8] The LPA does not provide specifically that the DC is required to frame a charge. Thus an omission to frame a formal charge would not amount to a breach of the LPA. There cannot be a breach where no such requirement exists. Although under the LPA there is no requirement for a charge to be framed, natural justice requires that *a person like the appellant facing disciplinary proceedings for misconduct to be informed sufficiently of the facts and particulars of the misconduct complained of to enable him to explain and exculpate himself.* The right to be heard is an integral part of the rules of natural justice.

[9] Domestic tribunals conducting an inquiry are by no means bound by the strict rules which apply to criminal trials or must follow the procedure of a court of law or adopt procedures analogous to that of a court of law unless proscribed by statutory provisions especially applicable to that particular domestic tribunal (*Mohd Nawi Ya'akub v P/ACP W Ramasamy, Ketua Cawangan Khas IPK Kelantan & Anor* [2009] 1 CLJ 475; [2008] 1 LNS 463). In *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310, Gopal Sri Ram JCA, adopted the view expressed by L 'Heureux-Duke' J in the Supreme Court of Canada in *The Board of Education of the Indian Head School v Knight* as follows:

> *It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court.* The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adopted to their needs and fair.

[10] Insofar as the issue of a charge is concerned, I am of the view that there is no requirement that it ought to be framed in any particular form or that it ought to take the form of a charge framed in a criminal proceeding. *What is essential is that the person against whom the misconduct is alleged is supplied with sufficient material particulars to enable him to meet the allegation.* In *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 Bowen LJ says:

> With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all.

It is a matter of substance rather than of form. In the case of *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124; [1987] 2 CLJ 119; [1987] CLJ Rep 368 the court said:

> ... the rules are not inflexible principles and may vary in their content in the circumstances of the case and in their ambit in the context of their application ... proceedings must not be looked at as would the proceedings of a court of law. *What is more important is not the form but the substance*. (Emphasis added.)

[26] The DB had confirmed the finding of liability of the DC after having said in its letter dated 13 November 2015 addressed to the appellant that it 'had affirmed the finding of liability of the Disciplinary Committee but disagreed with the recommendation on punishment in respect of *that part of the*

complaint that you had conspired with various parties to interfere and influence judicial appointments and ordered that you be struck off the roll of advocates and solicitors of the High Court of Malaya ...' (Emphasis added.) (See Appeal Record *Bahagian* C *Jld* 15 p 2990.)

[27] It was further submitted that the order of the DB dated 6 November 2015 was clear in that it stated as follows:

> IT IS HEREBY ORDERED that:
>
> ...
>
> (ii) In respect of that part of the complaint relating to the misconduct *that the Respondent had conspired with various parties* to interfere or influence judicial appointments *as found by the Disciplinary Committee*, the Respondent be and is hereby struck off the roll of advocates and solicitors of the High Court of Malaya to take effect twenty-one (21) days from the date of this Order. (See Appeal Record Bahagian C Jilid 15 Pages 2993.)

[28] Whilst we appreciate that there was no necessity to set out the complaint again against the appellant which original complaint was correctly stated as '... you had conspired with various parties to interfere and influence judicial appointments', the DB was nevertheless focusing on the equally grave misconduct of 'interfering and influencing judicial appointments'.

[29] Section 94(1), (2) and (3)(o) of the LPA provides as follows:

> Section 94. Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc.
>
> (1) All advocates and solicitors shall be *subject for the purposes of all disciplinary actions to the control of the Disciplinary Board*.
>
> (2) Any advocate and solicitor who has been *guilty of any misconduct shall be liable to one or more of the following penalties or punishments*:
>
> (a) to be struck off the Roll;
>
> (b) to be suspended from practice for any period not exceeding five years;
>
> (c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or
>
> (d) to be reprimanded or censured.
>
> (3) For the purposes of this Part, 'misconduct' means *conduct* or omission to act *in Malaysia* or elsewhere by an advocate and solicitor in a *professional capacity or otherwise* which amounts to *grave impropriety* and includes —
>
> ...
>
> (o) being guilty of any *conduct which is unbefitting of an advocate and solicitor* or which *brings or is calculated to bring the legal profession into disrepute*. (Emphasis added.)

[30] It must be borne in mind that if the 'various parties' involved are non-lawyers, the DC and DB would have no jurisdiction over them. It is in that sense that we must appreciate the finding of liability of the DC which finding was affirmed by the DB.

[31] The appellant had argued that Loh Gwo Burne CW3 and his father Loh Mui Fah CW4 were not his clients but even if that be true, the operative words used in s 94(3) of the LPA are 'misconduct' means 'conduct or omission to act *in Malaysia* or elsewhere by an advocate and solicitor in a *professional capacity or otherwise*'. (Emphasis added.)

[32] The appellant's conduct, words and actions need not be in relation to the Lohs as his clients in his professional capacity for s 94(3) also said 'in a professional capacity or otherwise', we noted the evidence of CW3 that the appellant had acted for his father CW4 and his grandfather before. See also the observation of the Federal Court in *Dinesh Kanavaji Kanawagi & Anor* where it was held that:

> [29] ... the word 'otherwise' in the phrase 'in a professional capacity or otherwise' is wide enough to include acts or omissions in any capacity other than as an advocate and solicitor ...

[33] The fact that no evidence was led on the involvement of other 'various parties' does not mean that there is no misconduct because the involvement of other parties whether proved or otherwise, does not change the character of the misconduct of the appellant and more so when these 'various parties' need not submit to the jurisdiction of the DB which has no jurisdiction over them to begin with.

[34] Whether 'various parties' are involved rather than the appellant alone, does not in the context of this complaint of misconduct, further aggravate the misconduct as the core and crux of the misconduct is still that of to 'interfere and influence judicial appointments'.

[35] Even in a criminal charge under the Penal Code, the punishment for an offence of conspiracy, abetting and common intention to do an illegal criminal act is no different from that of being charged alone or with persons at large or not identified. See s 120B read with s 109 of the Penal Code.

[36] Take for example in a criminal trial in *Azhar bin Che Wil v Public Prosecutor* [2010] 6 MLJ 22 (FC), where an accused and six others had been charged for murder under s 302 Penal Code read together with s 35 of the same and at the end of the prosecution's case, the second to seventh accused persons were acquitted and discharged and only the first accused was called to enter his

defence. The High Court at the end of the trial convicted and sentenced to death the first accused without amending the charge. His appeal to the Court of Appeal was dismissed.

[37] In the Federal Court it was argued for the first accused that the High Court judge had erred in not amending the charge under s 302 read with s 35 to one under s 302 only against the first accused, at the close of the prosecution's case after acquitting and discharging the other accused persons. Counsel submitted that by not amending the charge, the first accused was deprived of his right to recall witnesses. This, argued counsel, had caused a miscarriage of justice. Therefore, the conviction and sentence could not stand.

[38] The Federal Court in dismissing the appeal held as follows:

> [24] ... We are of the view that *the non-deletion of reference to the co-accused and s 35 in the charge either at the close of the prosecution's case or at the close of the defence's case does not render the charge bad in law*. Section 35 like s 34 *does not create a substantive offence* but merely a rule of evidence open to the prosecution when several accused persons are alleged to be involved in the commission of an offence.
>
> [25] Sections 34 and 35 of the Penal Code are now reproduced in full. They say:
>
> > 34 Each of several persons liable for an act done by all, in like manner as if done by him alone.
> >
> > When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
> >
> > 35 When such an act is criminal by reason of its being done with a criminal knowledge or intention.
> >
> > Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.
>
> ...
>
> [32] ... In the present case, *the first accused was represented by counsel.* Even though the charge was not amended, *there is nothing to prevent the defence from recalling or re-summoning any witness or to call further evidence*. This was not done. Thus, *the question of miscarriage of justice,* as advanced by Mr Karpal Singh *does not arise at all*.
>
> [33] In conclusion, it is our considered view that *the omission on the part of the trial judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the co-accused and to s 35 of the Penal Code did not cause any prejudice or injustice to the first accused. Obviously it does not render the charge bad against the first accused. The fact that the other co-accused have been acquitted, has no bearing upon the case against the first accused*. Accordingly, there

was nothing irregular as regard the conviction of the first accused on the charge of murder. (Emphasis added.)

[39] The court is ever mindful that a disciplinary proceeding conducted in accordance with its own rules must not be equated to a criminal trial procedure nor a charge for misconduct be equated to a criminal charge. Be that as it may, if even for a murder conviction such a conviction is not rendered unlawful and nor does it cause a miscarriage of justice by the non-amendment of the charge but that it is curable under s 422 of the Criminal Procedure Code, we see no good reason why a finding of misconduct should be nullified merely because the charge of conspiring with others have been substituted for a finding of misconduct of the appellant alone.

[40] There is also no merit in the objection raised by the appellant that the recording of the video clip was said to have been made in 2002 whereas Loh Gwo Burne CW3 said he recorded the appellant having a conversation with someone on the other end of the appellant's handphone on 20 December 2001 in the appellant's house in Kelana Jaya in the evening before his father CW4 and him had dinner with the appellant.

[41] Again we detect the appellant's learned counsel's gravitation towards equating the complaint of the misconduct to a criminal charge and the disciplinary proceedings to a criminal trial. We again recall what the Federal Court said in *Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor* as follows:

> [50] As stated earlier, *disciplinary proceeding involving an advocate and solicitor under the LPA or the 1994 Rules cannot be equated to criminal proceedings in a criminal court of law*, especially relating to the framing of a formal charge against the accused person. Section 173(a) of the Criminal Procedure Code ('the CPC') provides that 'when the accused appears or is brought before the court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried'.
>
> The form of a charge, *particulars as to time, place and person contained in a charge, and the manner of committing an offence to be stated in a charge are statutorily provided* under ss 152, 153 and 154 of the CPC. These are mandatory statutory requirements provided for by law which must be complied with in criminal proceedings in a criminal court of law. However, *there is no such requirement under the LPA or the 1994 Rules relating to disciplinary proceedings involving an advocate and solicitor*. (Emphasis added.)

[42] We thus find no merits in the submission of the appellant that the DB's order to increase the punishment on the appellant was based on a different and more serious charge of misconduct which was never alleged or proved against the appellant.

[43] Such a reference to the original complaint was historically correct though not directly relevant, but in any event it does not prejudice the appellant in any way or cause a miscarriage of justice and he and his counsel were given every opportunity to submit in mitigation.

[44] We therefore find no merits in this ground of appeal.

WHETHER THE CD VIDEO RECORDING PRODUCED BEFORE THE DC WAS ADMISSIBLE AS DIRECT ORAL EVIDENCE BY THE MAKER OF THE ORIGINAL CD

[45] The other major ground of appeal is that the video clip in the CD recording in question had been wrongly admitted and was totally unreliable without the original being produced. The Bar Council said that the video clip accurately depicted the conduct and conversation of the appellant which had become the subject of complaint of misconduct against the appellant and was accurate and authentic.

[46] What is more important is that Loh Gwo Burne CW3, the maker of the original video recording, had testified before the DC that, after watching the video clip being played, that the video clip was of the same video recording that he had taken of the appellant's actions and conversation with his Sony 707 digital camera when he and his father were at the appellant's house on the night of 20 December 2001.

[47] Whilst the complainant, the Bar Council, had stated in the complaint that the recording was made in 2002 based on the report in the online news portal, the maker of the video recording had stated the actual date of the recording which is the night of 20 December 2001 in the house of the appellant at Kelana Jaya. There was no evidence that there was another recording done by Loh Gwo Burne or anyone else for that matter on the same subject matter in 2002. We do not think that the year of the recording mistakenly stated as having been made in 2002 would cast serious doubt on the veracity of the recording such as to render it totally unreliable and inadmissible.

[48] The best evidence of the date or year of the recording would be coming from the maker of the video Loh Gwo Burne CW3 who did the recording in the presence of his father Loh Mui Fah CW4. Here is a case where the fact of the recording and by who are far more important than the date of the recording. With respect, we do not find any misdirection by the DC here when at p 5 of the DC report held that:

> We decided to admit ID-C1 as an exhibit as Loh Gwo Burne (CW3) who made the original recording when he was in the Respondent's house on 20th December 2001 was called to testify.

[49] One does not generally do any recording of an event in the house of one's host, what more of the host talking on his hand phone. The more rare and unusual an event the more likely for one to remember even after a passage of time. We would say that the event recorded is indeed a rare one, not only that a judicial appointment to such a position happens only after a serving CJM or PCA has vacated that position upon promotion or retirement but also that one is being allowed to, as it were, eavesdrop on a high-powered conversation between key players to some appointments to some pinnacle positions in the judiciary.

[50] What is totally out of the ordinary is of course to hear a senior lawyer speaking, so that he could be heard in his own house where his guests were there, to convey the message that he played a role in interfering or influencing judicial appointments of the top positions in the judicial hierarchy.

[51] It is true that no one would be able to recall word for word a conversation that one heard some seven years ago. However, depending on the peculiarity of the situation, one would be able to confirm if a particular recording had been taken after having refreshed one's memory.

[52] That's what happened here. Loh Gwo Burne CW3 was cross-examined and he stood his stand. The DC had the audio-visual advantage of seeing and hearing his evidence and the DC believed him. The event of the meeting in the house of the appellant between the Loh Mui Fah and his son was not denied by the appellant.

[53] What's being said in the recording as the appellant talking to someone over his hand phone about judicial appointments with respect to Tun Ahmad Fairuz came to pass as regards his appointment as CJM and later as the PCA. The contents of the conversation as coming from the appellant could be heard loud and clear though the voice of the person the appellant was talking to could not be heard. The transcript of the conversation was just a means of assisting the DC in following the conversation that the appellant had with someone on the other end of the line in the hand phone.

[54] All that the appellant maintained was that the video clip is not authentic. The appellant did not say categorically that he never ever had such a conversation on his hand phone but only that he could not recall having such a conversation when the Lohs were there in his house on the night in question.

[55] Here is where one must not miss the woods for the trees. The nub of the complaint is the conduct and conversation of the appellant complained against which if true in that it did happen the way it was recorded in the video clip, then that is the subject matter of the complaint. The recording is secondary to

A the event that happened. It aids and assists in one's recollection of an event that is said to have happened. That event may have happened some years ago and in this case it was some seven years ago from the date it was said to have been recorded.

B **[56]** This is where one must adopt a common-sense approach. For example if one has given a lecture of some length some seven years ago on a certain subject at a certain place, say a university. One may well have forgotten the topic and contents of the lecture. However if the lecture had been video-recorded and uploaded into the university's webpage and some seven years later the speaker is asked to verify the contents of his lecture from a CD recording of that uploaded video, we would think it not too difficult for the lecturer to so do.

D **[57]** It is said of the human mind that it does not quite forget everything in the past and that it has the ability to recall when refreshed by a certain flashback recording of a past event. The recording of the image of the speaker may not be exactly clear but from the voice played the speaker would be able to recognise if he has spoken those words aided further by a transcript produced of those words.

[58] Granted some subjects are more mundane and common to the speaker and the audience and it may take a while to recall where and when one had spoken on a common subject. Conversely, where the subject matter is more momentous or uncommon, recalling the event with the aid of a video recording would be much easier.

[59] Taking the analogy a notch further, what if it is alleged that there was a sentence in that lecture that is seditious and a crime under our law. The speaker may say that he cannot recall having said that or that the person in the video looks like him but is not him. The prosecution would have to investigate if they can trace the maker of the video recording and his testimony would be important with respect to where the recording was done and when.

[60] The person who recorded it may way have misplaced its original or even have deleted it but he may still be able to recall it. The video recording itself taken from the university's website may be sent for analysis by the experts to see if it is authentic or that it has been tampered with.

[61] That is the perspective that must be put in place when we analyse the issue raised with respect to the admissibility of a video-recording in a CD of a video content from a website where the maker of the video no longer has the original of the recording.

[62] All the cases cited as proposition that the CD video recording should be rejected because the maker of the video recording was not called, are not relevant because here the maker was called in this case in Loh Gwo Burne CW3. His father Loh Mui Fah CW4 was also present in the appellant's house where they said they had been there at the invitation of the appellant for a discussion of some of their court cases over dinner.

[63] Loh Gwo Burne confirmed that he was the one who took the video recording and that the person speaking on the video recording is the appellant. He had followed his father to the appellant's house and thought that he should just use his new digital camera to record what was taking place while waiting for the appellant, incessantly interrupted by telephone calls to his handphone, to be ready for dinner.

[64] Loh Mui Fah CW4 confirmed in his testimony before the DC that he had viewed the video clip and that the person speaking on the mobile phone is the appellant. He was positive and certain of this as he was at the appellant's house that evening with his son Loh Gwo Burne CW3.

[65] He said that after the conversation ended the appellant told him that he was talking to Dato' Ahmad Fairuz. Loh Mui Fah and his son Loh Gwo Burne are entitled and allowed to testify with respect to what they had seen with their eyes and heard with their ears or perceived through their senses. That is allowed under s 60(1)(b) Evidence Act 1950 being oral evidence that is direct as follows:

> 60 Oral evidence must be direct.
>
> Oral evidence shall in all cases whatever be direct, that is to say —
>
> (a) if it refers to a fact which could be *seen*, it must be the evidence of *a witness who says he saw it;*
>
> (b) if it refers to a fact which could be *heard*, it must be the evidence of *a witness who says he heard it*; ... (Emphasis added.)

[66] Proof of what a person saw or heard may be supplemented or supported or corroborated by documentary evidence. Thus a witness who testified of the fact that he had signed an agreement and could not recall all the salient terms, when shown a documentary evidence in the form of a copy of the agreement signed by him, would be able to refresh his memory and recall and confirm some other relevant terms and conditions of the agreement.

[67] The CD recording and copies of it are documentary evidence under the definition of 'document' under s 3 of the Evidence Act 1950 as follows:

> 'document' means any matter expressed, described, or howsoever represented, upon

A any substance, material, thing or article, including any matter embodied in a *disc*, tape, film, sound track or other device whatsoever, by means of —

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

B (b) *any visual recording (whether of still or moving images)*;

(c) any *sound recording, or any electronic*, magnetic, mechanical or other *recording whatsoever* and *howsoever made*, or any sounds, electronic impulses, or other *data whatsoever*;

C (d) a recording, or transmission, over a distance of any matter by any, or any combination, or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter. (Emphasis added.)

D

[68] The illustration that would be relevant is as provided:

A tape recording of a telephonic communication, including a recording of such communication transmitted over distance, is a document. A photographic or other visual recording, including a recording of a photographic or other visual
E transmission over a distance, is a document. *A matter recorded, stored, processed, retrieved or produced by a computer is a document.* (Emphasis added.)

[69] It is not seriously disputed that a digital camera would employ the technology that qualifies it to be a 'computer' within the meaning ascribed to
F it under s 3 of the Evidence Act 1950 as followed:

In this Act, unless the context otherwise requires —

'computer' means any device for recording, storing, processing, retrieving or producing any information or other matter, or for performing any one or more of
G those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer.

H **[70]** The scheme and structure of the Evidence Act 1950 is that generally all evidence of relevant facts are admissible unless prohibited by statute or that statute stipulates conditions to be fulfilled before the evidence is admissible or that public policy prohibits it being admissible.

I **[71]** The oral and documentary evidence of the witnesses especially that of the Lohs and the expert witness in CW2 would be relevant and admissible unless the appellant can refer to specific prohibitions under the Evidence Act 1950 or under any statute for that matter. It goes without saying that any discussion of the Evidence Act 1950 in the context of a disciplinary proceeding

is circumscribed by s 2 thereof where strictly speaking its applicability is with respect to judicial proceedings only.

WHETHER THE CD PRODUCED BEFORE THE DC MAY BE ADMISSIBLE AS SECONDARY EVIDENCE

[72] The appellant said that the original had not been produced and that Loh Gwo Burne is not the one who did the copying of the recording found in the news portal of Malaysiakini into the CD produced before the DC and that that CD was not the one sent to the expert witness CW2 for examination but rather another copy of it.

[73] It is provided for under the Evidence Act 1950 in s 64 as follows:

> 64 Proof of documents by primary evidence.
>
> Documents must be proved by primary evidence except in the cases hereinafter mentioned.

[74] The exceptions are found in s 65 as follows:

> 65 Cases in which secondary evidence relating to documents may be given.
>
> (1) *Secondary evidence* may be given of the *existence, condition or contents of a document admissible in evidence* in the following cases:
>
> (a) when the original is shown or appears to be in the possession or power —
>
> (i) of the person against whom the document is sought to be proved;
>
> (ii) of any person out of reach of or not subject to the process of the court; or
>
> (iii) of any person legally bound to produce it, and when after the notice mentioned in section 66 such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) *when the original has been destroyed or lost*, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is a public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(a) *In the cases referred to in paragraphs (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible*.

(b) In the case referred to in paragraph (1)(b) the written admission is admissible.

(c) In the case referred to in paragraph (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(d) In the case referred to in paragraph (1)(g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents. (Emphasis added.)

[75] There is no good reason for us not to accept the DC's finding that CW3 had recorded the event, as he said he did, with his digital camera in the presence of his father Loh Mui Fah CW4 of the appellant talking on his handphone. We accept the fact that the original recording which CW3 saved in a memory card had been deleted after he had downloaded its content to his computer and could no longer be retrieved. CW3 Loh Gwo Burne had provided a reasonable explanation for it. We do not expect someone to keep a recording of this nature for so long unless one has a planned purpose for utilising it in the future.

[76] CW3 had explained before the DC that he had downloaded the video recording he made onto his computer and then a month later, he had burnt the video recording from his computer into a video CD. This is not a case of a recording that was taken on purpose by CW3 but rather that he was bored with the meeting at the house of the appellant which involved mainly the father and he just happened to be fiddling with his digital camera with which he used for the recording. The original recording is lost within the meaning of s 65(1)(c) and hence secondary evidence of it is admissible under s 65(2) of the Evidence Act 1950.

[77] However the appellant is heard also to be objecting on ground that it was not the maker CW3 that had done the copying but some unknown persons. The evidence of CW4 Loh Mui Fah was that he had passed a copy of it to Dato' Seri Anwar Ibrahim, who was then the opposition leader in Parliament and did not know what happened after that. It then found its way into the website of Malaysiakini and from there the complainant downloaded it into a CD and lodged its complaint with the DB.

[78] This challenge to what is traditionally a copy of the original and subsequent copies therefrom had been anticipated in s 63 of the Evidence Act 1950 and provisions made for it as follows:

63 Secondary evidence.

Secondary evidence includes — A

(a) certified copies given under the provisions hereinafter contained;

(b) *copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;*

(c) copies made from or compared with the original; B

(d) counterparts of documents as against the parties who did not execute them;

(e) *oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means*. C

ILLUSTRATIONS

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original. D

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) *A copy transcribed from a copy but afterwards compared with the original is secondary evidence*, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original. E

(d) Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine copy of the original is secondary evidence of the original. (Emphasis added.) F

[79] Therefore though we do not know how many subsequent copies may have been copied from the original before it was uploaded into the Malaysiakini website and how many subsequent copies had been downloaded from there, the important thing is that the one who recorded it had himself seen the original recording and is in no doubt that what he saw of the CD produced at the DC hearing is the same as what he had originally seen, heard or perceived in the house of the appellant in the late evening of 20 December 2001. G H

[80] It is precisely the situation envisaged in s 63(b) of the Evidence Act 1950 '*copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies*' as well as s 63(e) of the Evidence Act 1950 as coming within the meaning of '*oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means*'. (Emphasis added.) I

[81] What is even more important is that the Lohs, the son doing the recording of the conversation and the father observing what was happening, are both able to confirm the contents of the CD produced before the DC as correctly or accurately capturing the events of that evening where the subject of the conversation that forms the evidence for the charge is concerned. It is authentic as in an accurate reproduction of the event and that the relevant contents have not been tampered with.

[82] Thus in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210, Justice Augustine Paul J (later FCJ) observed as follows at p 226:

> The proof of a tape recording, being a document within the meaning of s 3 of the Evidence Act 1950, is governed by ss 61 to 66 of the same Act pursuant to which the recording must be proved by being produced for the inspection of the court or by secondary evidence. Thus the tape recording must be played over in court before it can be admitted in evidence. In determining the admissibility of a tape recording, it is necessary to bear in mind what it is that is being sought to be admitted. This was aptly described in *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 where Mason CJ, Brennan and Deane JJ said at pp 185–186:
>
> > That is not to say that the tape is itself the admissible evidence of what is recorded on it. A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: It is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact.
>
> I also refer to *Conwell v Tapfield* [1981] 1 NSWLR 595 where Street CJ said at p 598:
>
> > What is the best evidence of the sounds entrapped in the record? It seems to me that there can be only one answer to this question, namely the best evidence is the reproduction of those sounds as sounds when the record is played by appropriate sound reproducing equipment. Much of the confusion that has crept into the cases stems from the fact that normally it is the human voice that is recorded and, when reproduced, this is commonly done in writing. But if, say, the relevant evidence was a screech of tyres before a collision and that had been recorded, there would be no denying that the best method of placing this evidence before the court would be by playing the record. There is not the slightest difference in basic principle where the recorded sound is the human voice.

[83] The court should not be mesmerised by increasingly advanced technology that ensures ease and accuracy of making multiple copies of recording from the original and should be ready to move with the times in allowing such evidence to be adduced under the relevant provisions of the Evidence Act 1950. On the other hand the court should caution itself that the same technology that promises ease and accuracy of duplication may also be

hijacked and harnessed by egregious element to produce tampered versions of 'cut and paste' recording where it is not easily discernible otherwise than through expert evidence. A balance has to be drawn between the value to be derived from an accurate and authentic recording of what happened and the ease with which tampered version may be produced to propagate inaccuracies and lies.

[84] In *Mohd Ali Jaafar*'s case, what was sought to be admitted was a tape recorded conversation between a complainant in a corruption trial and a police officer with respect to the latter soliciting sexual favours with respect to resolving an immigration offence. There was a need for the complainant to testify to the accuracy of the tape recording which she failed to in that case with the result that the tape recording was rejected as evidence before the court on appeal to the High Court from the sessions court.

[85] The High Court in *Mohd Ali Jaafar*'s case took a simple and common-sense approach in deciding whether a tape recorded conversation should be admitted. What is important is that the voices and accuracy of the conversation must be proved. It observed as follows:

> When the tape recording is played in court, the voices and the accuracy of the conversation must be proved. It is not necessary that there must be evidence to show that the taped conversation on which the prosecution seeks to rely was heard by any person (see *R v Chen* [1993] 2 VR 139). It can constitute primary evidence (see *Rama Reddy v VV Giri* AIR 1999 SC 1162). It was in this circumstance that the Court of Criminal Appeal held that the tapes were admissible in Maqsud Ali (see also *R v Cotroni* [1979] 2 SCR 256). In *Maqsud Ali*, conversations between two accused persons in custody were secretly recorded by the police by a hidden microphone. The accused spoke in a foreign language which the police did not understand and which, in any event, they were unable to hear. The content of the recorded conversation was duly proved and the accused were convicted notwithstanding that there was no other evidence to implicate them. The conviction was upheld. A tape recording can also be used to corroborate the oral testimony of a witness.

[86] The English case of *Regina v Maqsud Ali; Regina v Ashiq Hussain* [1966] 1 QB 688 referred to above, was one where the accused was convicted of murder. Primarily, what was sought to be admitted was a tape-recorded conversation of two suspects talking to each other in a bugged office before they were charged. The police had left them in the bugged office and the conversation of the two accused persons about the murder was recorded. It was in Urdu and translation of it into English and transcripts of it were made. On the admissibility of the tape recording, Marshall J observed as follows at p 701:

> For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been

reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. *In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence.* Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged. (Emphasis added.)

[87] Further in *Mohd Ali Jaafar*'s case at pp 225–226 it was also stated that accuracy would include the witness being able to identify the identity of the person captured in the recording and that the person who had done the recording gave an account of it as follows:

Proof of identity of the conversation which comes within the ambit of item (f) above is the most important element to be established when introducing evidence of a tape recording. In *ZB Bulkhari v BR Mehra* AIR 1973 SC 1788, it was held that the accuracy of what was actually recorded had to be proved by the maker of the record (see also *Maqsud Ali*). It is desirable that a witness who participated in a conversation that has been recorded gives an oral account of it. He may refer to the taped conversation to refresh his memory (see *R v Mills* [1962] 3 All ER 298). Alternatively, he must at least confirm that the tape recording is of a conversation which occurred if for some reason or other he is unable to give an oral account of the conversation. If there is no evidence to show that it is an accurate account of a conversation that occurred, then it is not admissible. In my opinion, the absence of such proof means that the tape recording sought to be admitted in evidence is in the same position as a document being tendered in evidence without proper proof of execution. In *R v Chen*, the Supreme Court of Victoria considered the evidence that must be led in introducing a tape recording and said that it depends on the circumstances of each case.

Marks, Southwell and Harper JJ in delivering the judgment of the court added at p 150:

> The test is whether there is sufficient material before the court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence. In other words, *there must be evidence, which the tribunal of fact is entitled to accept, that the recording is of a conversation which occurred and which would be admissible if proved by oral testimony*. In our opinion, *admissibility does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate*. (Emphasis added.)

I agree with this view as evidence to show that *the recording tendered is an accurate*

> *reproduction of a conversation which occurred would remove any doubt that the recording is inaccurate* due to failure to fully establish the other matters that are required to be proved. (Emphasis added.)

[88] The above requirements have been fulfilled in the present case as CW3 Loh Gwo Burne who recorded the video and his father CW4 who was present in the house of the appellant where and when the recording of the conversation took place, both testified positively to the conversation having taken place and the identity of the appellant being the person who was recorded as talking on his handphone.

[89] CW3 identified the video as part of the recording he made in the appellant's house the day he was there and if he is lying about it that could easily be revealed under cross-examination. He further confirmed that the video he saw at the DC hearing was the same and identical to the one he recorded in the appellant's house.

[90] DW4, besides confirming that the recording played at the DC hearing was that of the appellant speaking on his mobile telephone in the appellant's house while his son was also there with him, also stated that the appellant told him that the appellant was talking to Dato' Ahmad Fairuz after the telephone conversation ended. A witness is allowed to testify with respect to relevant facts of what he had seen and heard. That comes under s 60(1)(a) and (b) as oral evidence which is direct with respect to what one saw and heard.

[91] One does not have to be an expert to recognise the person and his voice in the video that one had taken some years ago if one were the person who did the recording or if one were present at the time, day and place of the recording of the event. A California appellate court in *Jorgensen v Beach 'N' Bay Realty, Inc* 177 Cal Rptr 882 (Ct App 1981) quoted Bob Dylan in his song *Subterranean Homesick Blues* to illustrate this point where a question is resolvable by common knowledge, there is no need to refer to an expert to tell us as follows:

> The correct rule on the necessity of expert testimony has been summarized by Bob Dylan 'You don't need a weatherman to know which way the wind blows.' The California courts, although in harmony, express the rule somewhat less colourfully and hold expert testimony is not required where a question is 'resolvable by common knowledge'.

[92] The recording was played in their presence in the proceedings before the DC for them to confirm the accuracy of the conversation recorded. Where the maker of the video recording or the person in whose presence the recording was made, had not been called to testify, the identity of the person in the video recording and the voice of the person would have to be identified by expert

A evidence. However here, both the Lohs were present when the recording was done, with Loh Gwo Burne testifying that he did the recording with his digital camera.

B **[93]** There is no good reason for the DC to reject their evidence for all that is needed to show that they are not credible would be for the appellant to say one of the following or a combination of them:

(a) I do not know them;

C (b) they have not been to my house;

(c) I did not have a dinner with them at my house on that day; and

(d) whilst I they had been in my house on that day, I did not have such a conversation in my house on my handphone as shown in the video recording.

D

[94] Instead the appellant had stated that he cannot recall that such a conversation had taken place. Not being able to recall would mean that the appellant is not able to rebut what the Lohs had testified for they were able to E recall what they heard after watching the video being played.

[95] The appellant was majoring on technicalities such as the original was not produced and that what was produced was not the one copied from the original, which in any event was not produced. The appellant ventured to F suggest that the complainant's case is doomed to fail as even what was produced was downloaded and copied from the website of Malaysiakini.

G WHETHER THE CD PRODUCED BEFORE THE DC IS NEVERTHELESS ADMISSIBLE UNDER S 90A OF THE EVIDENCE ACT 1950 BEING COMPUTER-PRODUCED EVIDENCE

[96] Our Evidence Act 1950 has kept abreast with advancement in technology such that the default position and general rule is that where H documents produced, and that would include recording or production of recording via memory card or CD, by a computer is concerned such evidence is admissible under s 90A and the weight attached to it may vary based on the circumstances set out in s 90B of the Evidence Act 1950.

I **[97]** The intention of Parliament was to allow the benefit of new technology to be harnessed forensically and to overcome technical objections of a copy not being admissible because the original is not produced or that it is lost, misplaced or irretrievable or that what is produced is not a copy from the original but a copy from a copy *ad infinitum*.

[98] The default position is that all documents produced by a computer or a statement contained therein is admissible as evidence of any fact stated therein if relevant. That is irrespective of whether the person tendering the document is the maker of such document or statement. There was thus no issue of CW1 Ambiga Sreenevasan to tender the document in the CD as containing the video clip downloaded from Malaysiakini website and copied into the CD via a computer. Section 90A(1) is worded as follows:

> Admissibility of documents produced by computers, and of statements contained therein
>
> (1) In any criminal or civil proceeding *a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated* therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. (Emphasis added.)

[99] In the event that the person tendering the document is not the maker of the document, then if there is an issue as to whether the document was produced by a computer in the course of its ordinary use, then a certificate signed by a person responsible for the management of the operation of that computer to that effect shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

[100] That is provided for in s 90A(2) and (3) as follows:

> (2) For the purposes of this section *it may be proved* that a document was *produced by a computer in the course of its ordinary use* by tendering to the court a *certificate signed* by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.
>
> (3)(a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.
>
> (b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate. (Emphasis added.)

[101] The added evidential benefit of such a certificate is that of a presumption in favour of the person tendering the computer-produced document that the computer was in good working order and was operating properly in all respects when the document was produced as stated in s 90A(4) as follows:

> (4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in *good working order and was operating properly in all respects* throughout the material part of the period during which the document was produced. (Emphasis added.)

[102] If there is a suggestion that the computer was not in good working order and was not operating properly, then an independent witness who can attest to that may be called and in this instance, both the parties called their respective experts to give evidence as to whether the video produced by the computer in the CD was accurate and authentic.

[103] Nowhere in s 90A is it stated or suggested that if the maker is not called or that the certificate is not produced then the document, here the CD cannot be admissible as evidence. To make this expressly clear Parliament added a s 90(6) as follows:

> (6) A document produced by a computer, or a statement contained in such document, *shall be admissible in evidence* whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, *and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.* (Emphasis added.)

[104] It becomes clear then that if a computer-produced evidence is relevant, it is admissible and that the computer that produced the document is deemed to have done so in the course of its ordinary use.

[105] Granted, that there will always be that ineradicable egregious element that may tamper with what is recorded and produced by a computer, the Evidence Act 1950 has s 90B to address the issue of the weight to be attached to the document admitted as evidence under s 90A. It reads as follows:

> 90B Weight to be attached to document, or statement contained in document, admitted by virtue of section 90A.
>
> In estimating the weight, if any, to be attached to a document, or a statement contained in a document, admitted by virtue of section 90A, the court —
>
> (a) may draw any reasonable inference from circumstances relating to the document or the statement, including the *manner and purpose of its creation*, or its *accuracy* or otherwise:
>
> (b) shall have regard to —
>
> (i) the *interval of time* between the occurrence or existence of the *facts stated in the document or statement*, and *the supply of the relevant information or matter into the computer*; and
>
> (ii) whether or not the person who supplies, or any person concerned with the supply of, such information or the custody of the document, or the document containing the statement, had any *incentive to conceal or misrepresent* all or any of the facts stated in the document or statement. (Emphasis added.)

[106] The Legislature has reposed much discretion with the court hearing the computer-produced evidence with respect to the weight to be attached to it after considering a multitude of factors which may be relevant and at the end of the day it would be very much dependent on its accuracy or authenticity and whether or not there is corroborative evidence from the people who actually saw or heard the event as recorded by the computer, in this case a video camera in the hands of CW3.

[107] Therefore the suggestion by the appellant that what had been originally recorded is longer than what was later uploaded into the website of Malaysiakini in that it had been edited does not cause undue alarm unless the appellant is saying that the part not produced would exculpate him. However that would only make sense and be valid a proposition if in the first place the appellant is prepared to concede and admit that it was him in the video clip. If it is not the appellant in the CD containing the video clip marked as exh C1 by the DC then it matters not a jot if what was produced before the DC was an edited version in that the original is of a longer length as confirmed by CW3 and not the 8:26 minutes as recorded in exh C1 produced before the DC.

[108] The way ss 90A and 90C are worded is such that it is an inclusionary rule admitting evidence rather than an exclusionary rule with the default position being that evidence produced by a computer is generally admissible subject only to weight to be attached to it by the court. Hence s 90C was included to cement the position of granting admissibility of computer-produced evidence such that it trumps and prevails over other inconsistent provisions in the Evidence Act 1950 and even under any other legislation in conflict with it as follows:

> 90C Sections 90A and 90B to prevail over other provisions of this Act, the Bankers' Books (Evidence) Act 1949, and any written law.
>
> The provisions of sections 90A and 90B *shall prevail and have full force and effect notwithstanding anything inconsistent therewith*, or contrary thereto, contained in any other provision *of this Act, or in the Bankers' Books (Evidence) Act 1949 [Act 33], or in any provision of any written law* relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding. (Emphasis added.)

[109] Therefore even if the original recording or document for some reason is not produced because it is lost, misplaced, irretrievable or the maker cannot be found, that does not prevent the computer-produced evidence in the CD from being admitted as evidence. It also does not matter whether the document produced by the computer is an unknown number of reproduction from the original computer-produced document. The distinction between an 'original' and a 'copy' of it or even 'copies from a copy' of it or for that matter 'copies of

A copies of copies', all fade and pale into insignificance. The ultimate question is whether what is recorded in the document is accurate or authentic.

[110] In this computer age the shift is from paper-less to paperless and hard copies of documents are now e-filed with trolleys of appeal records giving way to document stored in the cloud and retrievable in one's computer with the necessary safeguards in place to vouch for the authenticity and integrity of documents e-filed and retrieved. One does not have to avoid copies like plague! In fact the distinction between an original and copies produced by a computer or subsequent copies of copies is now a distinction without a difference.

[111] Not having the digital camera or the memory card or basically the original is not a barrier to admissibility by virtue of the special provisions in s 90A of the Evidence Act 1950 specially crafted to cater for computer evidence. By and large the computer is neutral and the marvel of modern computer technology is such that it can record events accurately and be saved into some memory card or hard disk and be reproduced or downloaded into another device with no loss of accuracy and no compromise on its authenticity or integrity.

[112] In the light of the new versatile provisions put in place we must liberate ourselves from the technical clutches of a previous era where documents were understood to refer to that which can be touched and felt as in a piece of paper.

[113] Our lives would be immeasurably the poorer and truth would be more difficult to pursue and prove if computer evidence is rendered inadmissible by applying the old paradigms of a bygone era where an original was typewritten and copies were understood to be carbon-copies!

[114] Failure to call the person who downloaded the video clip from the Malaysiakini website is not fatal and the important thing is whether what is recorded is accurate and authentic. Likewise the suggestion that a copy downloaded from the Malaysiakini website a day before another one was also downloaded with the former been sent for one's expert to analyse and the latter produced before the DC is different would sound juvenile and reflective a deep mistrust of computer.

[115] If indeed such a fear is real then it can easily be debunked with the two CDs being played concurrently. To suggest that the Bar Council's expert CW2 was analysing a completely different CD would be rather fanciful in a world where as many copies of the video may be downloaded onto an CD on the same or different days with no compromise to its contents.

[116] Neither should one be fixated over a break in the chain of evidence when

one cannot account for something that had been saved and then misplaced, only to resurface years later on some websites. At the risk of repetition, what is vital is the accuracy and authenticity of what is recorded and not how many times it has been downloaded and recorded from some websites before one is finally produced as evidence in court or before a tribunal.

[117] The paradigm shift that could be discerned is that the courts are no longer confined to the best evidence rule but that all relevant evidence is admissible subject only to weight to be attached to it where computer-produced evidence is concerned. We see this in the case of *Kajola v Noble* (1982) 75 Cr App Rep 149 where the appellant was charged with behaving in a threatening manner. At the hearing, a video-cassette recording which showed the appellant behaving in such a manner was admitted in evidence. Only a copy of the recording was adduced in evidence. This was because the original was in the possession of the British Broadcasting Corporation, who, as a matter of policy, did not allow the original documents to leave their premises. On the admissibility of the copy of the recording, which was not the best evidence, it was detailed by Ackner LJ as follows:

> ... the old rule that a party must produce the best evidence that the nature of the case would allow no longer applied except where the original document was available in the party's hands. *The court was not confined to the best evidence but could admit all relevant evidence. The goodness or badness of it went to weight and not admissibility. The old rule was confined to written documents in the strict sense of the term and had no relevance to tapes or films*. Accordingly the prosecution was entitled to rely upon the copy, which copy the justices were satisfied was an authentic copy of the original. (Emphasis added.)

[118] Thus even for criminal trials our Criminal Procedure Code has been amended by Act A1431 that came into force on 31 July 2012 to include now a new s 116B that reads:

> Access to computerized data
>
> (1) a police officer not below the rank of inspector conducting a search under this Code *shall be given access to computerized data whether stored in a computer* or otherwise.
>
> (2) *any information obtained under subsection (1) shall be admissible in evidence notwithstanding any other provisions in any written law to the contrary.*
>
> (3) for the purpose of this section, 'access' includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of the computerized data. (Emphasis added.)

[119] One would have thought that a greater stringency would be imposed on admissibility of computer evidence in criminal matters consistent with the need to prove a criminal charge beyond a reasonable doubt and whilst that is

still true, the Legislature appreciated that in a world where everything is now created, processed, edited, stored, accessed, retrieved and reproduced digitally, there is no virtue in erecting technical barriers to prevent the admissibility of computer evidence like in insisting on the production of the so-called 'original document'. That would be to throw the baby out together with the bathwater!

[120] Assuming for a moment that we had been wrong in stating that the CD of the video clip in exh C1 is admissible under s 63 of the Evidence Act 1950 as secondary evidence, as the original was no longer available as confirmed by CW3 Loh Gwo Burne, the same is nevertheless admissible under s 90A with the DC ascribing the necessary weight to be attached to it under s 90B in the light of the overall evidence adduced.

[121] The CD was rightly admitted to prove that the statements were made by the appellant. The fact that the statement was made was relevant to the misconduct complained of. It is for the appellant to show that he was not the one who was in the video and far more importantly the meeting at his house on that day did not take place or that even if it did, no such conversation as alleged or at all transpired.

[122] What the appellant said was quite equivocal in that 'The person depicted in the video recording looks like me but I am not prepared to say that it is me'. If by that measured qualification is meant that he was not the person in the video recording and if that is to be believed, it would mean that the testimony of the Lohs were concocted and that the video recording in the CD produced and marked as an exhibit was not authentic in that it does not accurately record what is said to have happened but rather that it had been tampered and indeed fabricated.

[123] For a consideration of that allegation of tampering and fabrication we need to consider the evidence of the expert witnesses called by both sides and determine whether the recording is authentic in that it accurately captured the event and statements made which is the subject of the complaint to the DB.

WHETHER THE CD PRODUCED AND MARKED AS AN EXHIBIT AND ACCEPTED AS EVIDENCE IS AUTHENTIC OR WHETHER IT HAD BEEN TAMPERED WITH OR IS OTHERWISE UNRELIABLE

[124] Whilst CW3 who took the video recording with his digital camera and CW4 who was there at the appellant's house on the day and time in question, both could testify to the accuracy and authenticity of the recording as played from the exh C1, they are not experts if one is looking for scientific justification

or basis for saying that the video recording is authentic. Only an expert with the relevant expertise and experience could give his opinion on the authenticity of the recording in the CD.

[125] A copy was downloaded into a CD from the Malaysiakini website and marked as CD-R and sent to CW2 for examination and analysis. He is Mohd Sharizuan, an expert witness from Cyber Security Malaysia. His expert report was produced and admitted before the DC.

[126] CW2 explained in his witness statement ('WS') of 3 May 2011 and in his report that he had conducted three types of analysis on the video clip namely of frame consistency analysis, pixel consistency analysis and light-shadow analysis, to determine if the contents of the video-recording are authentic and that they have not been tampered with. He explained the three tyres of analysis as follows in his answer to question 9 of his WS as follows:

> Frame consistency analysis on each frame of the video to ensure that each frame is consistent with each other. Inconsistency can be determined by amongst others, observing the localised contrast of video quality, noise on the video, blur effect, compression artefact and brightness variance. The detailed explanation of this analysis is found in pages 9 to Q of the Report.
>
> Pixel consistency analysis is the analysis of the pixels of the video frames to ensure that no object is added, or removed from the video. The detailed explanation of this analysis is found in pages 11 to 13 of the Report.
>
> Light-shadow direction analysis is the analysis on the direction of the object's shadows observed from the video. The formation of the shadows must be consistent with the direction of the light in all frames. The detailed explanation of this analysis is found in pages 14 to 17 of the Report.

[127] He concluded in his report as follows:

> Analysis no 1, 2 and 3 were conducted in order to verify the authenticity of the video file while analysis no 4 was conducted in order to recognize the identity of the speaker in the video.
>
> *The analysis concluded that the video file was authentic. No editing or addition that indicates superimpose was made to the video was found on the video file.*
>
> The analysis, however, could not determine the identity of the speaker due to the lack of the suspect's voice. (Emphasis added.)

[128] There was no sampling taken of the appellant's voice as he had through his counsel vigorously objected to it. If the appellant is serious in helping the DC to arrive at the truth of what happened and to expose the lie as he claimed, then there is no good reason for him not to have the respondent access to a recording of his voice that would so easily vindicate him and shame all those bent on castigating him as he had perceived them. Interestingly the appellant's

A expert Dr Catriona (Kate) Jean Storey-Whyte (RW2) did not do an audio track analysis on the voice to ascertain if it is that of the appellant.

[129] There was also the suggestion that as CW2 did not examine exh C1 but rather CD-R, then we are left in doubt as to whether he had analysed the right
B CD. We can accept the evidence of RW2 that exh C1 was created on 19 September 2007 on a CD manufactured by 'Swisstec' and that CD-R examined by CW2 was created on 18 September 2007 on a CD manufactured by 'Melody'.

C

[130] Whilst the two CDs containing the video clip is different in that they were created on different times and dates, there is no evidence to suggest that the video clips were of a different event. The assertion that one is one second shorter than the other and as such could be a recording of a different event
D would be too speculative and descending to de minimis.

[131] It was also not put to the expert witness CW2 that the CD he examined was of a different event recorded from exh C1 and there is no good reason why the respondent would have downloaded and copied a different CD or that
E CW2 had mistakenly examined a video clip of a different event altogether when the challenge made to CW2's expert report was insufficient frames were analysed. It would be to miss the elephant in the room altogether!

F **[132]** If the appellant and his expert had really believed that CD-R was different from C1 in its contents, then all that was needed was for CD-R to be played before the DC for their belief to be established. There is no need to follow the strict procedure of a criminal trial where the reception of evidence is concerned as the Evidence Act 1950 does not apply to proceedings of a
G disciplinary body (see s 2 thereof). We accept that nevertheless the relevant safeguards in the Evidence Act 1950 should be adhered to as far as possible to avoid the admission of evidence that is clearly dubious or has been tampered with or fabricated.

H **[133]** On the issue of whether the video clip that he examined has to be from the original digital file before subsequent copies of it could be determined to be authentic, DW2 explained in his WS as follows:

> Q11: Please explain whether a video clip must be from the original digital file for it
I to be authentic.
>
> A11: No, this is not necessary. *The authentication of a video file can be conducted without referring to the original video file. It can be determined from the video frame consistency analysis, pixel consistency analysis and light-shadow direction analysis.* (Emphasis added.)

[134] There was also the suggestion that whilst the recording may be authentic that does not prevent the event recorded from being staged, as an example given by RW2, the appellant's expert Dr Kate. However she did clarify that that is not the case before the DC. Anyway this version of the possibility of what was recorded as having been staged was not put to the respondent's witnesses especially to CW3 who had stated plainly how the video recording was taken. It was at the house of the appellant in Kelana Jaya where his father and him had been invited for dinner by the appellant. The appellant had wanted to discuss some of the legal matters that he had handled for the family seeing that he had acted for his father and grandfather before.

[135] They arrived at around 6pm on that day 20 December 2001 and as the appellant was busy speaking on his handphone, CW3 had asked for the appellant's permission to take some photos of the lounge area in the house and the dog. As the appellant was taking quite a while on his handphone, CW3 had also experimented with his new Sony 707 digital camera and took a recording of the appellant talking on his handphone.

[136] The possibility of that event unfolding in the house of the appellant being staged was not the version of the appellant who would be the best person to confirm or deny the event ever happening and he did not say that it was a staged event that was recorded. The allegation of the event being staged that was recorded must be considered against the probabilities of the case and, viewed in that light, the DC was right in rejecting the objections raised by the appellant against the admissibility of the CD in exh C1 and the report of CW2 on the authenticity of recording made.

[137] We too found the conclusions of the DC that the recording in the video clip is accurate and authentic to be well supported by the evidence adduced and the Bar Council's expert evidence.

WHETHER THE APPELLANT HAD REBUTTED THE EVIDENCE OF WHAT TRANSPIRED AS RECORDED IN THE CD

[138] Once the DC had accepted the video clip contained in the CD in exh C1 to be accurate and authentic, the DC is then required to consider the evidence of what was recorded and see if the matters spoken of by the appellant as captured in the recording with respect to what he had said he had done or was doing would amount to interfering or influencing the appointment of judges in the judiciary especially with regard to the appointment of Dato' Ahmad Fairuz as CJM and later confirmation as PCA.

[139] The words in the recording of the statements made by the appellant as captured in the CD exh C1 had been transcribed by the complainant for ease

of following what was said by the appellant as captured in the recording. CW1 had checked at the DC hearing for the correctness of the transcript as accurately reflecting what was recorded and played during the DC hearing. Objection was raised in that the transcript was not marked as an exhibit but remained as ID-C2. There is no necessity of marking the transcript as an exhibit and even if there is, the failure to do so is not fatal.

[140] It was pointed out very perceptively in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 at p 226 as follows:

> In my opinion, the preparation of the transcripts by PW5 is not fatal. It must be noted that *a transcript is admissible not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape* (see *Williams v The Queen* [1982] Tas R 274; *R v MacLean and MacLean* (1979) 49 CCC (2d) 399). Thus the preparation of a transcript cannot be equated with the recording of a cautioned statement by an officer who has played an active part in an investigation which has been held to be wrong (see *PP v Yong Kong Hin* [1981] 2 CLJ 178; *Lee Look v PP* [1985] 1 MLJ 240). (Emphasis added.)

[141] It was not suggested that the transcript was less than an accurate recording of what could be heard when the video clip in the CD was played before the DC hearing. It is a mere aid for all to follow what was being said by the appellant as captured and recorded in exh C1.

[142] Learned counsel for the appellant had taken umbrage with the learned judge's reproduction of the transcript at paras 56–57 of his grounds of judgement. We thought it fair and reasonable for the High Court to do so and we set out below the complete transcript to enable an assessment to be made as to whether what is said amounted to the misconduct complained of. The supporting facts in the public domain as summarised by learned counsel for the respondent which represented the fulfilment of the events, hitherto still in the future, are in italics and preceded by alphabet paragraphing as follows:

(1) Dzaiddin CJ lah. And the CJ said he is a relative to now the Agong, so he wants to stay on till 68. So, Tengku Adnan said, I told Tengku Adnan, yesterday I had a meeting with him. He said PM is already very angry with him, and ... he said no problem, he said he is going to make you acting er ... confirm your position as PCA, working very hard, and then get Tan Sri Mokhtar as the CJM lah.

(a) The Raja of Perlis, Tuanku Syed Sirajuddin ibni Almarhum Tuanku Syed Putra Jamalullall was elected the 12th Yang Di-Pertuan Agong for the period 13.12.2001 to 12.12.2006.

(b) Tun Dzaiddin was appointed Chief Justice of the Federal Court on 20.12.2000 and retired in March 2003. (Source document: News article from The Star dated 15.3.2003.

(c) Tun Dzaiddin is related by marriage to the Raja of Perlis. Tun Dzaiddin's wife, Tengku Noriah Tengku Ismail, is the Raja of Perlis' mother's sister i.e. Raja of Perlis' aunty.

(d) Tun Dato' Seri Ahmad Fairuz was appointed Chief Judge of Malaya on 1.9.2001. He was appointed President of the Court of Appeal on 1.12.2002. (Source documents: printout from NST Online dated 3.1.2008 and www.singaporelawreview.org.

(e) Tan Sri Dato' Seri Mokhtar bin Abdullah held the position of the Attorney General from 1994 to 2000. Thereafter he was appointed a Judge of the Federal Court. Tan Sri Dato' Seri Mokhtar bin Abdullah suffered a stroke on 6.8.2002 and passed away in 2003 (Source documents: printout from www.agc.gov.my, www.kehakiman.gov.my, www.malaysianbar.org.my.

(f) Tun Dzaiddin was born on 16.9.1937 and retired in March 2003 at the age of 66. (Source documents: [1993] 1 MLJ lvii and printout from NST Online dated 14.12.2007.

(2) Ah, so we just keep it confidential. *I am working very hard on it. Then there is a letter, according to Tengku, I am going to see him tomorrow, there is a letter sent to … ah … CJ, I mean to Tan Sri Dzaiddin, that Datuk Heliliah, Datuk Ali …, Datuk Ramli and Datuk Ma'arop be made judges*, and he rejected that Dr Andrew Chew and apa itu Zainuddin Ismail lah. Because Zainuddin Ismail who condemned your appointment and Tan Sri Mokhtar's appointment.

(a) Datuk Heliliah Mohd Yusof, Datuk Ramly Ali and Datuk Ahmad Maarop were made High Court Judges with effect from 1.2.2002. Datuk Ramly Ali and Datuk Ahmad Maarop were Judicial Commissioners prior to their appointment. (Source document: printout from www.highbeam.com)

(3) And then *(you?)* he also, it seems, wrote a letter that the remaining five be confirmed as judges. Ah, as per our memo I discussed with Tun Eusoff Chin and we sent the same memo to PM. *So I just want to get a copy letter just to confirm this has been done.*

(4) And then Tan Sri Dzaiddin said he is going to recommend six people for the court of appeal, but until today the letter hasn't come to PM. He never discussed, but neither has he sent the letter to PM. He has not sent. So I know, you know, under the Constitution for judges all is for your job lah Datuk to send, but we don't want to make it an issue now. Ah, tough time, hah?

(5) Ah, so OK actually *I told Tengku Adnan to inform PM, PM to call you for a meeting. But I will organize this so that Tengku Adnan will call you directly. And then I got your number, I will tell him to call you directly to arrange for you to meet PM lah.* Ah, so should be ok, ah, then ar … correct, correct, correct, because it is very important that the key players must be there.

(6) Correct, correct, correct, correct. Ah. Correct, correct. You know that the same problem Tun Eusoff Chin had. He tried to do all this and yet he had run out of soldiers. He couldn't do it because many were on the other camp. You know but the last time was unfortunate because Tun Daim was doing everything sabotaging, you know, ah.

(7) So, otherwise how are things with you, everything is ok? No, don't worry. You know sometimes Tan Sri Vincent say half the time we are talking about judiciary rather than doing the work. But if I don't do this part my work will be useless. Ha! Ha! Ha! Ha!

(8) Ah, yes. Correct, correct, correct, correct, correct. Right, right, right. Correct. Ah, ah, right, susah. You see he has now asked for six court of appeal judges, so that he can put his men before he retires.

(9) Correct, correct, correct, correct. Ah, and then? Ah, ah, correct, correct, correct, correct. Ah. But never mind, I will do this, *I will get Tengku Adnan to arrange for PM to call you and Tan Sri Vincent Tan, for PM to call.* You know actually I am very grateful to Tan Sri Vincent Tan. You know why, I brainwashed him so much I even quarrelled with him.

(10) One day I went to Vincent Tan's house, I fired him at night in the house. I said bloody hell if you don't do this who will do it? All these people, Tun Eusoff Chin, Datuk Ahmad Fairuz, Tan Sri Zainon (Zainal?) all fought for us. Then he called Tengku Adnan. I told Tengku Adnan. He said, saya bukan Perdana Menteri Malaysia lah, you know, if the old man don't want to listen to me, go to hell. He quarrelled with me. *I said, never mind, never mind, Tan Sri, you talk to PM again tomorrow morning to put Datuk Ahmad Fairuz as CJM. So next day morning he went, and he called me back 9:30, he said the PM already agreed.*

(11) So I said never mind, we hope for the best. So I said no harm trying, the worst it can happen is you lose. But you know the old man, he is 76 years old, he gets whispers from everywhere, and then you don't whisper, he get taken away by the other side. But now the PM is very alert because every time he gets letters from Tan Sri Dzaiddin, he called Tengku Adnan, he said discuss with Vincent, come and discuss. And ...

(a) Tun Dr. Mahathir bin Mohamad, the 4th Prime Minister of Malaysia was born on 20.12.1925. Therefore on 20.12.2001, he became 76 years old. (Source document: printout from www.ipdm.uum.edu.my).

(12) Yes, yes, ya. Correct, correct. Ya, but you see although I know PM, but my views ..., I am a lawyer in practice. My views are ... I go through them, I go through them lah.

Ah, ah, ah, ah.

(13) And then Dzaiddin will go and tell them that you went to talk to PM and make a big issue out of it. Oh ya, I think so, I think so.

OK, OK. Fine, fine, fine. OK, OK, OK, OK. Right. OK, OK.

(14) Ah, ah, correct, correct. Now I heard Raja Aziz; Raja Aziz two weeks ago spoke to my lawyer Thayalan, and another lawyer Anad, in the High Court, they had a case with each other. So, Thayalan and Anad asked Raja Aziz, how is Tan Sri Wan Adnan? He said he is on the way down. But you know what is the shocking thing he said? Datuk Fairuz became CJM. He overruled everybody. And three months' time, he is going to be PCA, and 6 months' time he is going to be CJ. He said I can't take this shock. He told them.

(15) Ha, so it seems that they are going to organize a campaign to ..., they are going to organize a campaign to run you down. But you just keep quiet, don't say anything. Even the press ask, you say I leave it to God, that's all. Don't say. I really like your message. You said I work very hard, what can I do, I leave it to God. That's the best answer that Datuk you can ever give.

(a) YM Raja Aziz Addruse wrote in an article published in Insaf, the Journal of the Malaysian Bar, criticizing the appointment of Tun Ahmad Fairuz as Chief Judge of Malaya. (Source document: Vol XXX No 3 of Insaf, September 2001).

(b) After his appointment as Chief Judge of Malaya, Tun Ahmad Fairuz stated to the press as follows:- 'As far as I'm concerned I thank God for this appointment and since I was appointed I have worked very hard to deliver the goods'. This was in response to Raja Aziz Addruse's article in Insaf. (Source document: The Sunday Star, 11.11.2001 — Courts to 'stagger' hearing times).

(16) Ah ... Ya, I will also get Tan Sri to remind PM to put your Tan Sri-ship this year lah. Ah, you know, this will elevate you, and you know. Ah. Oh yes, yes, yes, yes. Ah. Steve Shim got so fast. You know, Tan Sri Chong waited for years for Tan Sri-ship.

(a) Tan Sri Steve Shim was appointed Chief Judge of Sabah and Sarawak on 1.9.2000 and was conferred the title 'Tan Sri' on June 2001. (Source document: NST 2.6.2001)

(b) Tan Sri Chong Siew Fai was appointed Chief Judge of Sabah and Sarawak in 1995 and was conferred the title of 'Tan Sri' in June 1999. (Source document: NST 7.6.1999).

(c) Tun Ahmad Fairuz was appointed Chief Judge of Malaya on 1.9.2001 and was conferred the title of 'Tan Sri' in June 2002. (Source document: NST 3.6.2002)

Ah ... My God, that's why. Ah. Correct, correct. Correct, correct. Ya, ya, ya, ya, ya. Ah, correct. Right, right, right. Correct. Right. Ah. Correct, correct.

(17) Oh but don't worry, we will organize this. And if Tan Sri Vincent and Tengku Adnan want to meet you privately, I will get them, I will call you. We will organize a private arrangement, in a very neutral place.

(18) No don't worry, Datuk, I know how much you suffered for Tun Eusoff Chin. And Tun said Datuk Ahmad Fairuz 110% loyalty. We want to make sure our friends are there for the sake of PM and for the sake of the

country. Not for our own interest, not for our own interest. We want to make sure the country come out well. You suffered so much, so much you have done. You know, for the election petition, Wee Choo Keong, everything. How much, nobody would have done all these.

(a) Tun Ahmad Fairuz when he was a High Court Judge sat as an Election Judge in respect of a challenge against the election of Wee Choo Keong as Member of Parliament for Bukit Bintang in the 1995 general elections. Tun Ahmad Fairuz held in favour of the Applicant namely Lee Chong Meng and declared Lee Chong Meng as a Member of Parliament for Bukit Bintang in place of Wee Choo Keong. (Source document: *Lee Chong Men lwn Suruhanjaya Pilihanraya Malaysia dan lain-lain dan satu tindakan lain* [1995] MLJU 307*)*

(b) Tun Eusoff Chin as Chief Justice of the Federal Court was given the statutory authority to appoint Tun Ahmad Fairuz as the Election Judge in respect of the Wee Choo Keong petition. (Source document: Section 33 of the Election Act 1958)

(19) Yes, you know. Ah, good lah. OK, don't worry. I am constantly working on this.

Ya, ya, don't worry, don't worry. *We work hard on this. Datuk, and then if Tan Sri Vincent and Tengku Adnan want to see you, I will organize it in such a confidential place.*

(20) OK Datuk, all the very best. And God bless you and your family. (Emphasis added.)

[143] Bearing in mind that the appellant had not himself asserted that he was just boasting or that he was play-acting or that the event was staged, the transcript of the recording reproduced above in bold would represent what the appellant said he had done and would do and the DC was right to conclude that such action would amount to interfering with and influencing judicial appointments.

[144] The evidential burden had shifted to the appellant, at the conclusion of the complainant's case before the DC, to rebut what was adduced by the Bar Council but all that the appellant did was to state the following:

(a) the video clip was not authentic;

(b) he was not the person in the video clip;

(c) the voice recorded was not his voice as the video clip could not be authenticated;

(d) he could not recall the event (of the recording) and the conversation in the video clip;

(e) he denied having the contact number of Tun Ahmad Fairuz; and

(f) he denied having spoken to Tun Ahmad Fairuz on the telephone before.

[145] It is of course for the DC to decide whether or not to believe the appellant where he had not denied that the Lohs had come over to his home in Kelana Jaya on 20 December 2001 for a dinner at his invitation but only denied that the person in the video is him and that he could not recall such a conversation.

[146] The appellant argued that the complainant must still prove the truth of the statements asserted to have been made by the appellant and not the mere fact that the statements were made. However in a case like the present one where the appellant said he did not make the statements it is sufficient for the complainant to prove that it is he who made the statements as captured in the video clip.

[147] It would be different if the appellant had admitted that it was he in the video clip and that he had made those statements but that what was said was not said for real but merely a boasting or a play-acting or staging an act. In such a case the legal burden to be discharged would be for the complainant to prove the truth of the statements made and not just the mere fact that the statements were made. See the Privy Council from Malaysia in *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220.

[148] The DC was entitled to act on what the appellant said as true and to take at face value as correct, what he said he had done and would do unless his defence was that he was boasting only to his client or potential client or play-acting. The appellant could then produce his handphone record to show that he had not called Dato' Ahmad Fairuz at that time or at all since he maintained that he did not have Tan Sri Ahmad Fairuz's handphone number. He could also call Dato' Ahmad Fairuz to corroborate his evidence that there was never such a conversation that he ever had with him.

[149] Whether or not he could in reality achieve what he said he is doing to ensure that what was planned come to pass is immaterial. At any rate, what he said he had wanted to ensure would come to pass did in fact happen with 'prophetic' precision. Whether or not the appellant really have such an influence reaching to the highest echelon of the powers that be is not as important as the fact that the appellant had painted a picture of his pervasive and powerful influence to persons who at least had been his clients before and could be a potential client and whom he had invited to his house to discuss legal matters over dinner.

[150] Bereft of all of the above in rebutting the evidential burden that had shifted to the appellant, the DC's finding that the complainant had proved

beyond a reasonable doubt that the appellant had interfered with and influenced judicial appointments is safe.

[151] The facts as found by the DC and affirmed by the DB are not so perverse as to be plainly wrong for this court or the High Court to intervene. In fact we see no good reason to interfere with the finding of facts of the DC and the DB. The High Court had affirmed it and we had every good reason as set out above to affirm it too.

WHETHER THE DB ORDER OF 6 NOVEMBER 2015 IS DEFECTIVE FOR NON-COMPLIANCE WITH S 103D(1) OF THE LPA IN FAILING TO RECORD THE REASONS FOR REJECTING THE DC'S RECOMMENDATIONS

[152] It was submitted by learned counsel for the appellant that there was misdirection in that the learned judge relied on the DB's letter dated 23 February 2016 which was never given to the appellant and dated more than three months after the DB's order and the said letter was not part of the appeal record to justify the DB's increase of punishment against the appellant.

[153] Section 103D of the LPA is set out in full so that we may better appreciate its import in the chronology and context of the sequencing of the subsections and what is provided for as well as what is not provided for as follows:

(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board *may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee* and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, *the Disciplinary Board shall record the reason for the rejection*.

(2) The Disciplinary Board may in appropriate cases *impose a greater or lesser penalty or punishment* than that recommended by the Disciplinary Committee.

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

(4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate or solicitor under subsection (2) or (3), it shall *notify the advocate and solicitor of its intention to do so* and *give him a reasonable opportunity to be heard.*

(5) Where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant, it may stipulate the time within which such restitution ought to be made.

(6) A sum ordered by the Disciplinary Board under subsection (5) to be restituted may be recoverable by the complainant as a civil debt. (Emphasis added.)

[154] A plain reading of s 130D(1) being placed as it is before s 130D(4) would appear that the recording by the DB of reasons for rejecting the recommendation of the DC for instance would be more for the record and would doubtless be conveyed to the advocate and solicitor concerned when he appeared before the DB in s 130D(4) with his solicitors especially if the advocate and solicitor or his counsel are at a loss as to why the DB has disagreed with the recommendation of the DC.

[155] There does not appear to be any requirement of service of the reasons for the rejection of the DC's recommendation where penalty or punishment is concerned though one may presume that the reasons should be given if the advocate and solicitor concerned should request for the reasons. Further the fact that s 130D(4) requires the DB to inform the advocate and solicitors of its intention to make an order likely to be adverse against him and to give him a reasonable opportunity to be heard would safeguard against any prejudice arising with respect to the appellant not being aware of the reasons for the greater or even greatest punishment.

[156] It was submitted by learned counsel for the appellant that the reasons for rejecting the recommendation of the DC must itself be stated in the order so made. There is no requirement for that for the reasons may go into several paragraphs as in this case and what is generally to be stated in all orders is the dispositive portion which tells the parties how the matter has been disposed of. The reasons given would be akin to grounds of judgment for a court order and the court order would contain only the dispositive portion of the order of the DB in this case. See by analogy the decision of the Federal Court with respect to registering of an arbitrator award where only the dispositive part is registered in the enforcement order of the court in *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors* [2020] 3 MLJ 1.

[157] Thus in the case of *Lau Keen Fai v Lim Ban Kay@ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2011] 3 CLJ 213, it was held at para 17 that 'there was no requirement that the DB had to specifically state in the order that it agree or reject the finding and recommendation of the DC. It was a question of substance rather than of form. What was crucial was that the order must state clearly the decision of the DB' (see also the case of *Meena a/p Muniandi lwn Sarjit Kaur d/o Tharam Singh (Majlis Peguam Malaysia, pencelah)* [2016] MLJU 501; [2016] 9 CLJ 253).

[158] In the Court of Appeal case of *Bar Council Malaysia v Sarjit Kaur d/o Tharam Singh* [2017] MLJU 818; [2017] 1 LNS 719, the respondent there submitted that the order of the DB should be set aside on the grounds that, inter alia, the DB failed to act in accordance with s 103D(1) of the LPA in that it failed to state whether the recommendation of the DC was accepted or rejected when making a decision. The Court of Appeal clarified the approach taken as follows:

> In the instant case, the respondent's complaint was not related to proportionality principle. The four grounds which the appellant relied on as per decided cases will fall within the domain of the DB and also the judicial policy of non-intervention *even though there may have been trivial breach related to technicalities rather than substance.* (Emphasis added.)

[159] The same approach was also taken in the case of *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaran a/l N Gopal (Bar Council Malaysia, intervener)* [2016] 5 MLJ 79; [2016] 7 CLJ 667, where it was held that technical non-compliance as a general rule where grave and serious misconduct has been established, will not assist the appellants to set aside the order of the DB.

[160] However the grounds of the appeals both in the High Court below and before us was on why the appellant should not have been found liable at all for the misconduct complained of and the allegation that the DB had found the appellant liable for a different misconduct and not why the recommendation on punishment by the DC should not have been disturbed by the DB or substituted with being struck off the Roll.

[161] The court is at liberty to hear what reasons the DB may have to reject the recommendation of the DC which reasons are stated in the submission of the Bar Council as follows:

> The Board considered that appointments to higher judicial offices should be based on merits and the person appointed to such office should be man or woman of undoubted integrity and of sound judgment and of nobility of character. Any attempt to influence (whether it succeeds or otherwise) would be not in the interest of public and would be inimical to the administration of justice. Any sort of 'influence peddling' is against public policy and would be injurious to the whole justice system.
>
> The facts revealed (which the DC has accepted) that the Respondent has committed misconduct which is of unfitting of an advocate and solicitor and which brings or is calculated to bring the legal profession into disrepute.

[162] Even an order of the High Court if it is not accompanied by its grounds of judgment would not render the order null and void but that on appeal the appellate court would hear arguments afresh as if it is a rehearing of the case. If

indeed the appellant had not received the reasons for the greater punishment imposed and was hampered in his appeal, we are most certain that had he written in he would be duly furnished with the reasons.

[163] Learned counsel for the appellant had referred to the Federal Court case of *Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor* [2017] 1 MLJ 596 in support of the proposition that the DB shall record the reason for rejecting the recommendation of the DC. However that was not the ratio of the case but merely obiter as it was clearly stated as follows:

> [60] The disciplinary proceedings on the matter before the DB was conducted on 16 May 2014 (prior to the effective date of the amendment to s 103D(1) of the LPA). The suspension order was also made on 16 May 2014. At that time, there was no statutory requirement in s 103D(1) or other provisions of the LPA which required the DB to give and to record its reason if it chooses to reject the recommendation made by the DC. There was no statutory duty or obligation to do so. Therefore the DB cannot be said to have exceeded its power for failing to give reasons for its rejection of the DC's recommendation.

WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO BE HEARD BY THE DB FAILING TO CONSIDER AND APPLY THE CORRECT PRINCIPLES OF LAW PROVIDED UNDER S 103D(4) OF THE LPA

[164] The DB had initially issued notice to the appellant to appear before it on 12 September 2014 and then it was adjourned to 17 January 2015 and later to 20 June 2015 on ground that the appellant was indisposed medically as he was seeking treatment for his medical condition in the United States of America.

[165] After some three adjournments on medical grounds, the DB did not act improperly in continuing with the proceedings on 8 October 2015 when learned counsel Mr Thayalan, appeared for the appellant, and raised two objections in writing with the result that hearing was adjourned to 6 November 2015.

[166] On 6 November 2015, the appellant's counsel attended the hearing and requested the DC to decide on the two objections in writing. One was with respect to the appellant's right to be heard in person before the DB and the other was with respect to the allegation of bias on the part of Mr Gurmit Singh, a member of the DC.

[167] The DB, after proper deliberation, dismissed both the objections and accordingly proceeded to allow the appellant's counsel Mr Thayalan to make a plea in mitigation on the question of punishment. Mr Thayalan had said that

A he had no instruction to proceed with mitigation. He had then decided not to further participate in the proceedings and had indeed walked out of the hearing before the DB.

B **[168]** In the circumstances of the case, we find that there is no merit in the appellant's argument that there had been a breach of natural justice in that the appellant was not heard in person before the punishment was handed down by the DB.

C **[169]** We note that in the past, at the DC hearings, that had stretched over four years, every adjournment had been acceded to by the DC. There has to be an end to a perennial request for adjournments just as there are limits to gravity and the enduring virtue of patience.

D **[170]** All that is required under s 103D(4) is a 'reasonable opportunity to be heard' and surely what is reasonable must depend on the circumstances of each case. Whilst every latitude should be given on health issues there comes a time where the appellant in this case can well make his representations through his solicitors and we are more than confident that Mr Thayalan who appeared at
E the last adjourned date before the DB would be more than able to advance every mitigating ground on why a heavier punishment should not be imposed.

[171] Instead he had chosen, with his client's consent, to say that he had no
F further instructions to proceed and left the hearing. There is no breach of natural justice where the appellant could not be present after three adjournments in a proceeding that started with a complaint by the Bar Council to the DB on 26 September 2007 and the decision of the DC on 20 February 2014 right up to the last day adjourned by the DB for the appellant to be heard
G on 6 November 2015; spanning eight years!

[172] At the stage of the proceedings before the DB from the first date of 12 September 2014 for the appellant to appear before the DB to the last adjourned date of 6 November 2015 was more than a year. One must appreciate that all
H things must be brought to a closure so that parties may decide what to do next in terms of exhausting avenues of appeal.

[173] In the peculiar circumstances of this case it would not be right for this court to interfere with matters left in the province of the DB with respect to
I how the 'reasonable opportunity' to be heard ought to be exercised. The DB's refusal to grant further adjournment when it was all ears to hear the appellant's counsel was reasonable in the circumstances of the case.

WHETHER THERE IS ANY MERIT IN RAISING THE OBJECTION OF BIAS ON THE PART OF MR GURMIT SINGH, A MEMBER OF THE DC, WHO WAS SAID TO BE SEEN HAVING A CONVERSATION WITH LOH MUI FAH CW4 AT THE LOBBY OF THE BUILDING WHERE THE DB IS BEFORE THE DC BEGAN HEARING THE COMPLAINT

[174] The meaning of 'bias' in the judicial and quasi-judicial context has been explained in the Court of Appeal case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213; [1995] 2 CLJ 900 as follows:

> Bias with regard to anyone acting in the judicial capacity means anything which tends or may be regarded as *tending to cause such person to decide a case otherwise than on the evidence* (*R v East Kerrier Justices* [1952] 2 QB 719): *Jowitt's Dictionary of English Law* (2nd Ed) Vol 1, under 'Bias' at p 210.

[175] Any issue of bias must be raised promptly and not after the end of the proceedings when the decision has been delivered. This is to give reasonable opportunity for the member of the tribunal to consider whether the objection raised on bias is justified in the circumstances of the case. The appellant himself was content to proceed with the hearing before the DC, in which Mr Gurmit Singh was a member, for a period of almost four years. That does not sound like a person who is disturbed by the notion of real likelihood of bias.

[176] The allegations run like this:

(a) Mr Loh Mui Fah (CW4) met with Mr Singh at the foot of the steps leading to Wisma Maran on 5 September 2011, where the DC proceedings were held;

(b) CW4 took out some document believed to be the witness statement of CW4;

(c) CW4 discussed the contents with Mr Singh;

(d) the conversation took place for 15 minutes; and

(e) CW4 immediately left when he saw the appellant and Mr Thayalan.

[177] One cannot hedge against bias as it were an arrow in one's quiver to be used if the decision is not in one's favour and to happily abandon it if it is in one's favour. As the appellant knew about it before the start of the proceedings before the DC, then if that short conversation raised concerns of bias, the concern should be raised there and then and not raised for the first time before the DB. It was also not raised at the first three hearing dates before the DB and it was raised only for the first time at the DB hearing of 8 October 2015.

A **[178]** We have no idea and neither does the member complained of, Mr Gurmit Singh, with respect to what was alleged to be said or asked by Mr Loh Mui Fah to or of the said member that would merit the lay member of the DC to recuse himself from hearing the complaint. Both Mr Gurmit Singh and Mr Loh Mui Fah had no opportunity to defend themselves.

B

[179] The appellant in support of his allegation of bias on the part of Mr Singh had produced two photographs which quality is so low that the identity of the individual in the photographs cannot be determined with certainty. Perhaps if a reasonably sophisticated handphone had been used with a C camera-video function, a clear recording could have been taken.

[180] Assuming for a moment that the persons in the photograph is Mr Gurmit Singh and Mr Loh Mui Fah CW4 as alleged, all that it shows are two men in the main lobby of Wisma Maran in full view of the public. There is D nothing to substantiate that CW4 took out his WS and subsequently discussed it with Mr Singh. There is nothing to show that the conversation took about 15 minutes.

E **[181]** The allegation was raised for the first time before the DB in the affidavit of Kanahalashmi a/p Kandar Vellupillai. The time for taking of fresh evidence is already over but far more important is that the appellant had proceeded placidly with the passage of some five years only to be agitated by the disturbing thought of a member of the DC being bias against the appellant, which is F perhaps why he had recommended a stiffer punishment.

[182] In any event there are still the other two members of the DC who had come to the same finding of facts of liability and any recommendation on the punishment is a mere recommendation to the DB who may or may not agree G with the DC. Having examined the evidence adduced before the DC, we are not persuaded that Mr Gurmit Singh's decision had been tainted with bias. It is a decision which any tribunal applying its mind to the evidence and weighing as it were the probabilities of the case would have arrived at where the liability is concerned.

H

[183] We are reminded of what was observed in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* on unwarranted and unfounded allegation of bias being a 'most serious matter' and 'an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material'.

I

[184] The passage of time has a way of purifying and testing, as it were, one's intention; burning away the dross such that what remains would be the pure gold of unsullied desire. The seriousness of such an accusation as bold as bias would smack of an afterthought, a clutching away at straws! Thus the sagacious

statement from the UK Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 at p 76 ; [2000] QB 451 as follows:

> ... every application must be decided on the facts and circumstances of the individual case. *The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be*. (Emphasis added.)

[185] We find no merits in the objection raised on bias and would dismiss it especially when the learned High Court judge had recorded in para 61 of his grounds of judgment that the ground of bias was withdrawn by the appellant's counsel during the hearing of his submission.

WHETHER THE COURT SHOULD INTERFERE WITH THE PUNISHMENT METED OUT BY THE DB WITH RESPECT TO STRIKING THE APPELLANT OFF THE ROLL OF ADVOCATES AND SOLICITORS

[186] As for the punishment, that is best left to the DB for it is the profession that has been conferred the duty to enforce its own disciplinary standard. The DB had complied with s 103D of the LPA in giving its reasons for disagreeing with the recommended punishment of the DC. Very rarely would a court intervene with respect to the punishment meted out on its member unless it is totally out of proportion to the gravity of the misconduct.

[187] The appellant was found guilty of the misconduct which amounted to grave impropriety under s 94(3)(o) of the LPA 'being guilty of any *conduct which is unbefitting of an advocate and solicitor* or which *brings or is calculated to bring the legal profession into disrepute*' and r 31 of the Legal Profession (Practice and Etiquette) Rules 1994 that 'Every advocate and solicitor shall at all times *uphold the dignity and high standing of the profession*'. (Emphasis added.)

[188] It is for the DB to register its abhorrence of the actions of the appellant to even think and articulate his thoughts to anyone with the intention of it being believed by those who had the opportunity to hear that the appellant had such an influence to interfere with judicial appointments at the highest level. What is more grievous is that what had been complained of by the Bar Council had not been rebutted by the appellant as the DC had found the evidence of the Lohs to be credible, supported as it is by the video clip, found to be accurate and authentic, and the appellant having chosen to take the stand that he is not the person in the video clip.

[189] We appreciate that the punishment of been struck off the roll is reserved for the most egregious of misconduct involving generally of breach of trust of client's money. However the profession and the DB in particular is entitled to

A show its revulsion at such an inimical conduct of the appellant, unbefitting of an advocate and solicitor and which can only bring the legal profession into disrepute and thereby incurring the odium of its members, fanning the flames mistrust among the public and undermining in the process, confidence in the judiciary.

B

[190] Indeed any sort of, and anything that smacks of, 'influence peddling' is against public policy and would be injurious to the whole justice system. There is no lobbying that would be necessary for a judge as one's written judgments would speak for themselves in as much as one's work on the bench would be an C open book for all to study and scrutinise and like Caesar's wife, one who aspires to higher office in the judiciary must be found to be 'above reproach'.

[191] We accept that the standard of proof is that of beyond a reasonable doubt where the misconduct involves the element of dishonest conduct and D moral turpitude as held by the Federal Court in *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 1 MLJ 95; [2018] 9 CLJ 622 and the cases of *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1; [2008] 4 CLJ 317; *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; [2018] 2 CLJ 1, E *Campbell v Hamlet* [2005] 3 All ER 1116 and *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191.

[192] That burden on the Bar Council has been discharged for reasons given above. F

[193] We found no merits in this appeal and the appeal was dismissed with costs of RM30,000 to the respondent subject to allocator. The decisions of the High Court and DB were affirmed.

G

Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali

H

I